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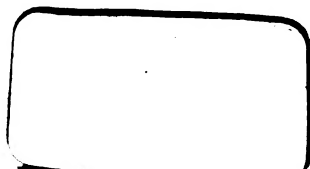
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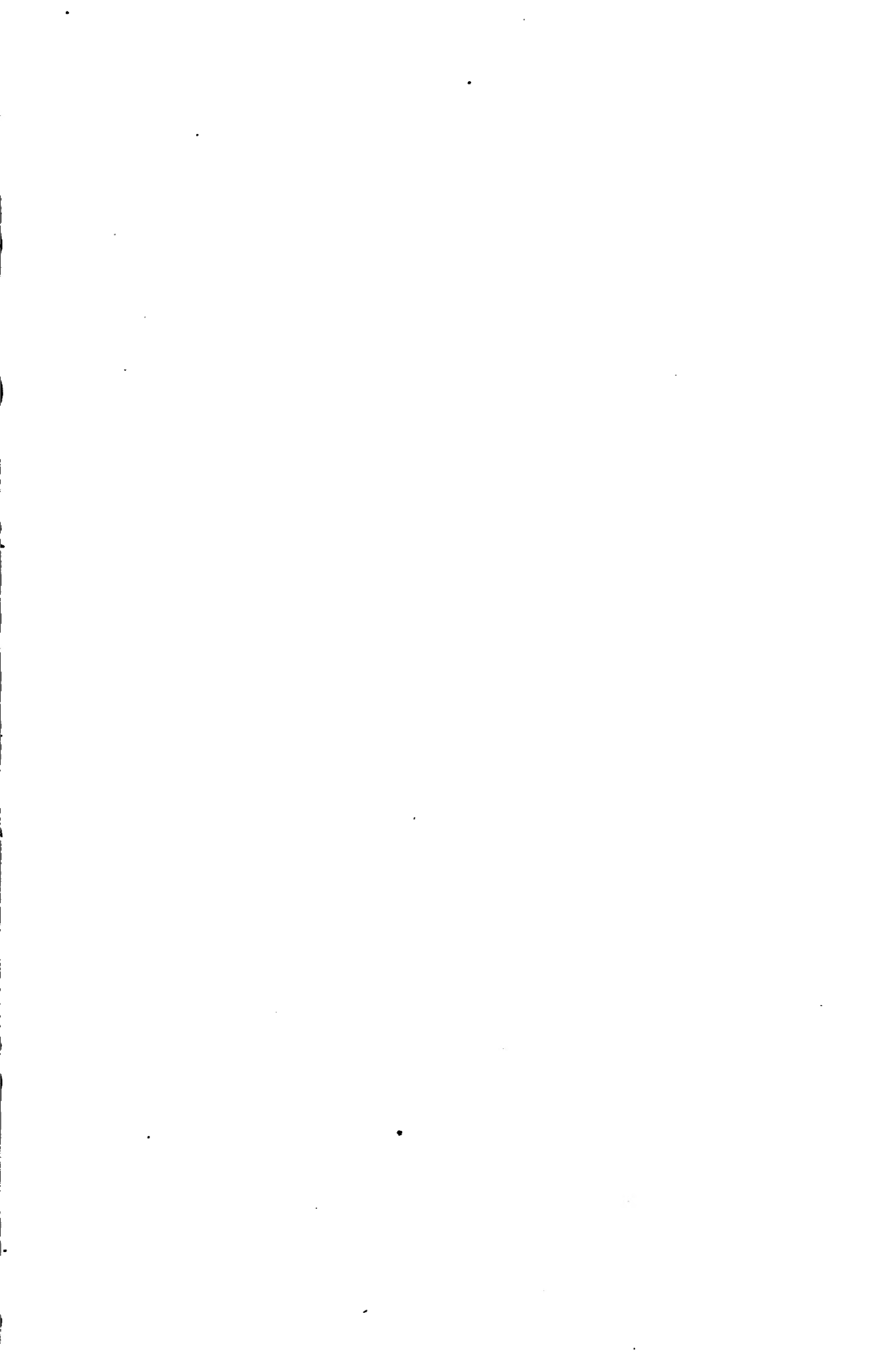
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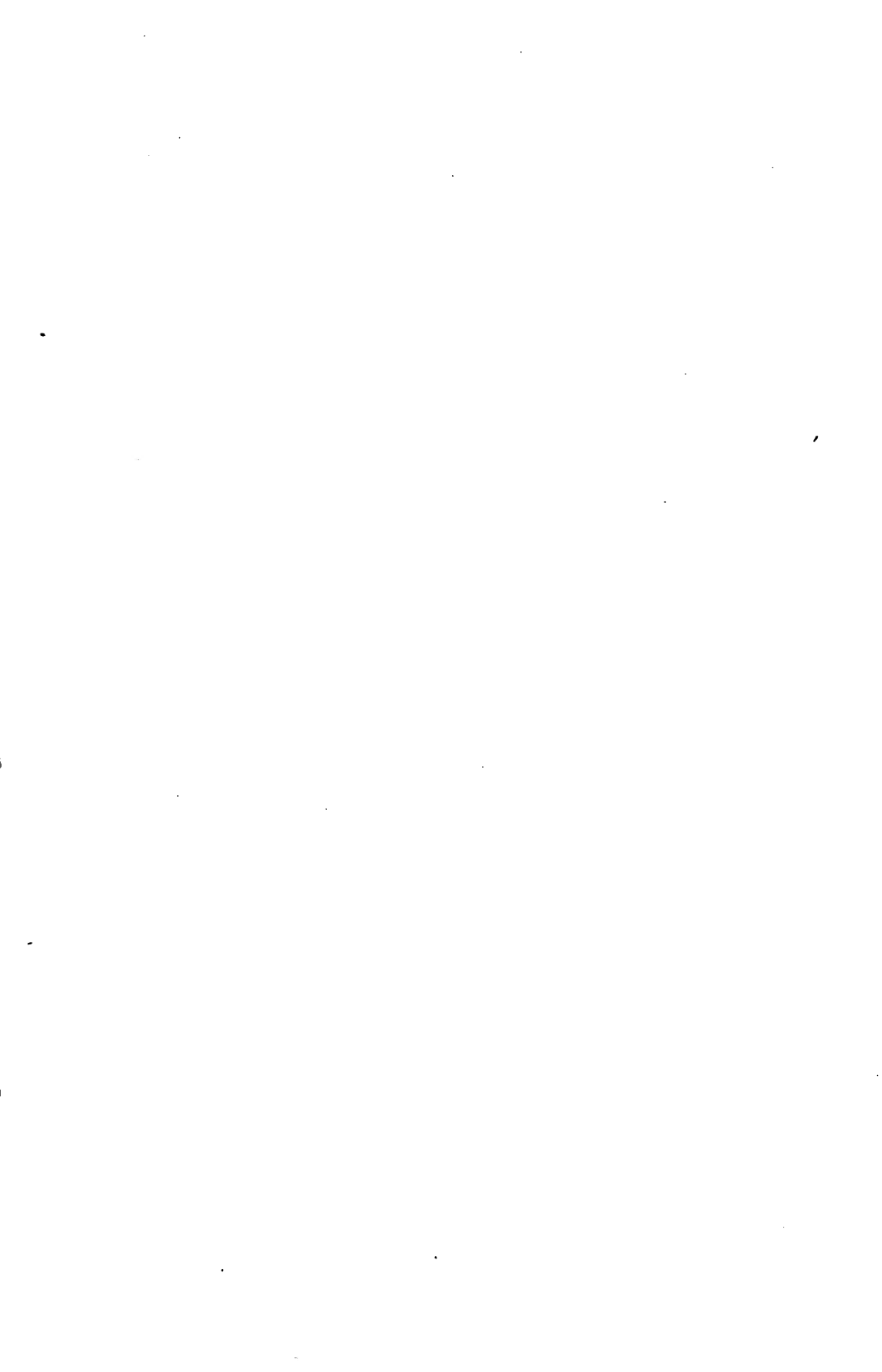
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HANDBOOK
OF THE
LAW OF PRINCIPAL AND AGENT

By FRANCIS B. ^{Uchanon} TIFFANY

AUTHOR OF DEATH BY WRONGFUL ACT, LAW OF SALES, ETC.

ST. PAUL, MINN.
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PREFACE.

The object of this book, as has been explained more fully in the introductory chapter, is to present the general rules and principles of that part of the law of Agency which may conveniently be classed under the head of Principal and Agent. Topics which are commonly classed under the head of Master and Servant have been largely excluded, or have been discussed only incidentally. The scope of the book has been thus limited both because it was the desire of the writer to treat the matters considered with greater fullness of illustration in text and notes than would have been possible had its scope been enlarged, and because the matters excluded have been covered by other books in the Hornbook Series.

The subject presents many difficult points as to which there is conflict of opinion, sometimes in respect to the rules, sometimes in respect to the reasons for the rules. It has been the aim to discuss these questions briefly and, when possible within the limited compass of an elementary book, to give expression to the views of the judges in leading cases; and on all points treated to cite, in addition to the leading cases, a sufficient number of the later cases to make the book serviceable to the practitioner as well as to the student.

The author desires to express his obligation to the many writers who have contributed to formulate and classify this branch of the law,—and particularly to Story, whose Commentaries are still indispensable to the student; to Prof. Floyd R. Mechem, whose great treatise deservedly ranks as a standard of authority; to Prof. Ernest W. Huffcut, whose

recent book has done so much to clarify and illuminate the subject; to William Bowstead, Esquire, whose Digest of the Law of Agency admirably fulfills its object of reducing the English law to a concise statement of definite rules and principles; and to Prof. Eugene Wambaugh, whose full and discriminating Selection of Cases forms a basis for the study of Agency.

F. B. T.

St. Paul, June 1, 1903.

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HAND-BOOK

OF THE

LAW OF PRINCIPAL AND AGENT.

PART I.

IN GENERAL.

CHAPTER I.

INTRODUCTORY.

1. Agent Defined—Broadest Sense.
2. Narrower Sense.
3. Servant and Agent Distinguished.

AGENT DEFINED—BROADEST SENSE.

1. An agent, in the broadest sense, is a person authorized by another, called the principal, to act on his behalf.

SAME—NARROWER SENSE.

2. An agent, in the narrower sense in which the term is used to distinguish the person to whom it is so applied from other so-called agents, is a person authorized by another, called the principal, to act on his behalf, and represent him, in bringing him into legal relation with a third person.

The foregoing definitions by implication embrace a definition of principal, whether in the broader or narrower sense.

The terms "principal" and "agent"¹ are difficult to define, because they are used in different senses. In the broader

§§ 1-2. ¹ The following are some of the definitions of "agent":

"An agent is a person duly authorized to act on behalf of an-

sense in which the terms are frequently used, the relation of principal and agent exists whenever, by reason of authority conferred by one person upon another to act on his behalf, the act of the latter—not necessarily an act authorized—is by law imputed to the former. Using the terms in this broad sense, if one person, pursuant to the command of another, does an act which is a trespass, thereby subjecting the latter to liability for the tort, the former is the latter's agent. And if a person who is employed by another to do work under his direction and control, and therefore technically termed a servant, in the course of the employment does an act which injures a stranger, and for which, although it was in fact unauthorized or even forbidden, the law declares that the employer must answer, the actual tortfeasor is in the commission of the act the agent of the person who employed him to work, and the latter is a principal. The actual doer of the act is said to be the agent of the other, because in the commission of the act he represents him; that is, because the act, in respect to the obligations and rights to which as between the other and third persons it gives rise, is in legal effect the

other, or one whose unauthorized act has been duly ratified." Evans, Agency, 1.

"An agent is one who acts for and in the stead of another, termed the principal, either generally or in some particular business or thing, and either after his own discretion in full or in part, or under a specific command." Bishop, Contracts, § 1027.

"An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal." Bowstead, Dig. Ag. art. 1.

"When a person is employed to bring his employer in legal relations with a third person, he is an agent." Wright, Prin. & Ag. 2.

"An agent is a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations." Hufcut, Ag. (2d Ed.) 17.

"One who represents another, called the principal, in dealing with third persons." Cal. Civ. Code, § 2295; Mont. Code, § 3070: N. D. Rev. Code, § 4303.

other's act. The person who does a representative act may conveniently be designated as the representative, and the person represented as the constituent. In its broad sense, agency is the relation between constituent and representative.²

The terms "principal" and "agent," and even "agency," are,

² The following are some of the definitions of "agency":

"The relation of principal and agent takes place wherever one person authorizes another to do acts or make engagements in his name." Dunlap's *Paley on Agency*, 1.

"In the common language of life, he, who, being competent, and *sui juris*, to do any act for his own benefit, or on his own account, employs another person to do it, is called the principal, constituent, or employer; and he, who is then employed, is called the agent, attorney, proxy, or delegate of the principal, constituent, or employer. The relation, thus created, between the parties, is termed an agency." Story, *Agency*, § 3.

"Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it." 2 Kent, *Com.* 612.

"Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations." Wharton, *Agency*, 1.

"Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons." Mechem, *Agency*, § 1.

"Agency is a relation between two persons such that the act of the former, called the agent, is by law imputed as the act of the latter, who is called the principal." Campbell, *Sale of Goods & Commercial Agency*, 519.

"Agency is a term signifying the legal relations established when one man is authorized to represent and act for another and does so represent and act for another." Huffcut, *Ag.* (2d Ed.) 5.

"The relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf." Ga. Code 1882, § 2178.

[however, also used in a narrower sense.³ In this sense, they are confined to the relation between constituent and representative when the authority is conferred for the purpose of creating a new legal relation between the constituent and a third person and the act authorized is of a nature to create such new relation—in common language, when the representative, or agent, is authorized to represent the constituent, or principal, in business dealings with third persons. It is with agency in this narrower sense that this book is mainly concerned.]

Authority—How Derived.

Strictly speaking, a person cannot be an agent except by virtue of authority derived from, or conferred upon him by, another to act on his behalf.⁴ It is enough to say here that the authority need not exist at the time of the performance of the act, for under certain conditions the authority may be conferred subsequently, by ratification.⁵ Again, although no authority has been conferred, a person may be estopped to deny that another is his agent.⁶ The manner in which the authority may be derived will be discussed in detail in treating of the mode in which the relation of principal and agent may be created.

[³ "It is to be regretted that the word 'agency' should be used to cover the whole field of representation, and that the word 'agent' should at the same time be used as the name of the representative in one branch of it. If there were another word for agency (e. g., 'representation'), or another word for agent (e. g., 'deputy'), many tedious circumlocutions might be avoided. It might be better still if the whole field were called the 'Law of Representation,' while the branch known as the 'Law of Principal and Agent' were called the 'Law of Agency,' and that known as the 'Law of Master and Servant,' were called the 'Law of Service.'"]

Huffcut, *Ag.* (2d Ed.) 10, note 5.

⁴ As to so-called agency by necessity, post, p. 39.

⁵ Post, p. 46.

⁶ Post, p. 34.

SERVANT AND AGENT DISTINGUISHED.

- 3. A servant, as distinguished from an agent in the narrower sense, is a person employed by another, called the master, to render to him, subject to his direction and control, personal service in the performance of acts which are not of a nature to create new legal relations between the employer and third persons.**

¶ It is plain good sense to hold a man responsible for the acts which he has caused to be done and for their probable consequences, whether through natural forces or human agencies.¹ If the law went no further than to hold the employer answerable for acts which he had actually authorized, the problems presented would be comparatively simple. In many cases, however, he is held responsible in tort for the wrongful act of a person employed by him, although he did not authorize it and even forbade it, and is held answerable for a contract, although in making it his agent exceeded or violated his instructions. Two principal questions in the law of representation are concerned with the liability of the employer in tort and in contract for the acts of his representative in excess or in violation of the authority actually conferred.

¶ Where one person is employed by another to perform acts which have not for their object the creation of new legal relations with third persons, but which in distinction to such acts may be called, very roughly, manual and mechanical, unless the acts authorized are essentially of a character to infringe the rights of others, the employer cannot properly be said to authorize the person whom he employs to subject him to liabilities. Nevertheless, if the latter, in the course of his employment and in furtherance of it, commits a tort, the employer may be answerable for it. Whether he is so answerable depends upon whether the person committing the tort was employed in a character which the law has seen fit to

§ 3. ¹ O. W. Holmes, Jr., 4 Harv. L. Rev. 347.

regard as representative, and depends in most cases upon whether the relation of master and servant exists between the employer and the employed. The master is liable for the torts of his servant, committed in the course of and in furtherance of the employment, notwithstanding that the wrongful act was not authorized or was forbidden.)

Same—Servant, Agent, and Independent Contractor.

¶ The relation of master and servant exists only between persons, one of whom, the servant, is employed by the other, the master, to perform services subject to the employer's order and control. "A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, retains the power of controlling the work; and he who does work on those terms is in law a servant, for whose acts, neglects, and defaults * * * the master is liable."² On the other hand, if the person employed is one who undertakes to produce a given result, but is free to select the means and methods of accomplishment, in things not specified beforehand, and the employer does not retain the right to order and control the manner in which the work shall be done, the person employed is an "independent contractor," for whose wrongful acts, neglects, and defaults the employer is not liable.³ Yet even where the relation is that of employer and independent contractor, if that which the contractor is employed to do is in itself wrongful, as a trespass or a nuisance, the employer is answerable for the injury, because he has in effect commanded or authorized the wrongful act.⁴

¶ When, on the other hand, one person employs another to perform on his behalf acts which have for their object the creation of new legal relations with third persons, the liability of the employer for the acts of the person whom he employs depends in the main upon different considerations.

² Pollock (Webb's) Torts, 92.

⁴ Post, p. 270.

³ Pollock (Webb's) Torts, 93.

In this case the employer does, or may, authorize the agent to subject him to liabilities, as well as to acquire rights on his behalf, in other words to represent him, for such is the very purpose of the authority. The agent is authorized to do for his employer acts which are of a nature to bring him into contractual relations, as by making offers, representations, and promises, or which are of a nature to affect his existing contractual or other legal relations by way of performance, discharge, and enforcement. It is his function to create new relations, usually, if not always, by inducing third persons to act. The third person is, as a rule, dealing with the agent, and bound at his peril, if he would hold the principal responsible, to ascertain the extent of the agent's authority.] It is true that the principal may be liable for the contract of his agent made in excess of the authority actually conferred, but this can never be if the third person has notice of the limits of the authority. As against third persons who deal with the agent without notice of limitations upon his authority, he has the powers usually confided to an agent of the character in which the agent is employed, which may exceed the authority actually conferred, and within the limits of those powers he can bind his principal by contract; but, as against persons with such notice, he cannot bind the principal unless the contract was actually authorized.⁵

[Whether the agent is subject to the direction and control of the principal, as a servant is subject to the direction and control of his master, is immaterial.] It is, indeed, the duty of an agent to obey the instructions of his principal,⁶ and hence to a greater or less extent an agent, as such, is, within the scope of his agency, subject to the principal's direction and control. But where the employer, by the very nature of the authority, gives to the person whom he employs the right to represent him, to create new legal relations between himself and third persons, the question of how far the employer retains the power of control has no bearing upon the em-

⁵ Post, p. 180 et seq.

⁶ Post, p. 396.

ployer's liability. That consideration is material only when the employment is for the performance of what have been termed manual and mechanical acts, in determining whether the person employed is a servant or an independent contractor. An independent contractor is neither a servant nor an agent; [†] in the performance of his undertaking he acts on his own behalf.

The same considerations which determine the liability of the principal for the contracts of his agent have an important bearing upon his liability for his agent's torts. When the employment is solely for the purpose of creating new legal relations with third persons, the power of the person employed to subject his employer to liability for torts is necessarily narrow. A tort arises upon the breach of an existing legal duty, as upon an invasion of the right of another to his property, his personal liberty and security, and his reputation. Except in the case of deceit and other wrongs involving fraud, and originating in a false representation, the wrong consists, not in inducing another to act to his injury, but in acting to his injury upon him, and arises only in the performance of what has been described roughly as manual or mechanical acts. It follows that, when the employment is merely for the creation of new legal relations, a tort for which the employer can be held liable must, in nearly every case, be one which arises in a false representation. [†] The principal is liable for the agent's fraud, because he has employed the agent to represent him in dealing with third persons, and must be held to answer for the manner in which the agent conducts himself toward third persons with whom he deals. But he is answerable only provided the false representation by means of which the fraud is committed is one which, as against the person dealing with the agent and induced thereby to act to his injury, must be deemed to have been authorized. He is liable only when the representation is made in an authorized transaction, or in a transaction in which the agent

[†] 2 Kent, Com. (12th Ed.) 280, note 1.

had apparent authority to engage, and the third person had not notice that either transaction or representation was unauthorized.⁸) In the rare cases in which the principal may be liable for a tort not arising in a false representation, as where an attorney having authority, as an incident to the conduct of his client's suit, to cause an arrest or a levy to be made, does so when the circumstances do not justify him, the rule governing the liability of the principal does not differ in effect from that governing the liability of the master, although it rests, it seems, rather upon the fact that the principal has given the agent the right to represent him in doing the act than upon any consideration of the retention of direction and control.⁹

Same—Servant and Agent Defined.

The terms "servant" and "agent" are frequently used interchangeably,¹⁰ but a distinction may conveniently, and it is believed properly, be drawn between them, based upon the considerations which have been set forth.¹¹ A servant is a

⁸ Post, p. 275.

⁹ Collett v. Foster, 2 H. & N. 356; post, p. 281.

¹⁰ "There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity, such as stewards, factors, and bailiffs, whom, however, the law considers as servants pro tempore with regard to such of their acts as affect their master's or employer's property." 1 Blackst. Com. 427. Cf. Perkins, Prof. Book, §§ 184, 185.

¹¹ "The great and fundamental distinction between a servant and an agent is that the former is principally employed to do an act for the employer, not resulting in a contract between the master and a third person, while the main office of an agent is to make such a contract." Dwight, Pers. & P. P. 323.

"When dealing with the operation of contract we had to note that although one man cannot by contract with another confer rights or impose liabilities upon a third, yet that one man might represent another, as being employed by him, for the purpose of bringing him into legal relations with a third. Employment for this purpose is called 'agency.'" Anson, Contracts, 329. See, also, Id. 332; Wright, Prin. & Ag. 2.

"As between the principal and his agent, agency is a special kind

person employed by another, called the master, to render to him, subject to his direction and control, personal service in the performance of acts which are not of a nature to create new legal relations between the employer and third persons. An agent is a person authorized by another, called the principal, to act on his behalf and represent him in bringing him into legal relations with third persons.]

Of course, one and the same person may be employed in both capacities. For example, a servant may be directed by his master to make a sale, and to use the master's wagon in going to the place of sale; and on the way he may, by careless driving, injure a third person; and in making the sale he may give a warranty which he was not authorized to give. Here the liability of the employer for the injury results from the relation of master and servant;¹² while his liability for the warranty, if he is liable, results from the relation of principal and agent.¹³

Basis of Law of Agency.

It is often said that the law of agency is founded on the maxim, "qui facit per alium facit per se"—he who acts through another acts in person. But the principle which the maxim expresses is hardly sufficient to explain the identification of constituent and representative, by no means complete, but often apparently resting upon no logical ground, which pervades the law of principal and agent and of master and servant. The maxim has been recognized in English law from

of contract. But it differs from other kinds of contract in that its legal consequences are not exhausted by performance. Its object is not merely the doing of specified things, but the creation of new and active legal relations between the principal and third persons." Pollock, Contr. (3d Ed.) 49.

See, also, *Kingan & Co. v. Silvers*, 13 Ind. App. 80, 37 N. E. 413.

¹² *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; *Wright, Prin. & Ag. 2*; *Dwight, Pers. & P. P. 323*; post, p. 269 et seq.

¹³ Post, p. 207.

the earliest times.¹⁴ [It is, indeed, as has already been said, good sense to hold a man responsible for acts which he has caused to be done and for their natural consequences. This, however, falls short of the identification of constituent and representative, which holds the master responsible for consequences which are not the natural results of acts commanded, and which may even have been done in violation of express command; which treats an undisclosed principal as a party to a contract although the other party believed that he was contracting with the agent personally; and which enables a person by ratification to make his own a trespass or a contract in which he had no part.¹⁵ In short, throughout the law of agency we are continually met with the notion that the constituent and representative are one and the same person, and that the rights and liabilities of the constituent are not other than they would be were he actually present and acting in person. In other words, we are met by the legal fiction of identity of principal and agent. "Such a formula, of course, is only derivative. The fiction is merely a convenient way of expressing rules which were arrived at on other grounds. * * * But when such a formula is adopted it soon acquires an independent standing of its own,"¹⁶ and tends to give rise to new applications beyond the rules which it sought to formulate.

The view has been advanced that the basis of this fiction, so far as it is not to be explained by the logical principle, "*qui facit per alium facit per se*," is a survival or outgrowth of the early law of master and servant, which in turn was based upon the primitive conception of the family, whereby the head of the family was held responsible for the acts of its members, which included slaves, and at a later day servants;¹⁷ and that the law of agency "is the resultant of a

¹⁴ O. W. Holmes, Jr., 4 Harv. L. Rev. 347, citing Fitzherbert's *Abridgment*, *Annuities*, pl. 51 (H. 33 Ed. 1), and other authorities.

¹⁵ 4 Harv. L. Rev. 348.

¹⁶ 4 Harv. L. Rev. 351.

¹⁷ O. W. Holmes, Jr., *Agency*, 4 Harv. L. Rev. 345; 5 Harv. L. Rev. 1.

conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results became too manifestly unjust.”¹⁸

Others deny to this fiction so great an efficacy, at all events within the sphere of torts, and find the explanation of the master's liability for the uncommanded torts of his servant in the greater ability of the master to pay damages;¹⁹ or his employment of an instrumentality which in the nature of things may result in violation of another's rights and responsibility within reasonable limits for the instrumentality employed;²⁰ or, again, in the principle of social duty, that every man in the management of his own affairs shall so conduct himself as not to injure another.²¹

Classes of Agents.

Agents are sometimes divided into classes based upon the different nature and extent of their authority or upon other points which make the particular classification convenient.²² Thus agents are classed as universal, general, and special;²³ mercantile and nonmercantile;²⁴ *del credere* and not *del credere*;²⁵ professional and nonprofessional;²⁶ gratuitous and paid.²⁷ The distinctions founded upon these differences, so far as they are material, will be discussed hereafter.

Certain classes of agents have acquired specific names based upon the nature of their duties. Among these may be mentioned factors or commission merchants,²⁸ whose business it is to receive and sell goods upon commission; bro-

¹⁸ 4 Harv. L. Rev. 346.

¹⁹ 2 Pollock & M. Hist. Eng. Law, 530.

²⁰ 7 Harv. L. Rev. 383.

²² Evans, Prin. & Ag. 2.

²¹ Post, p. 274.

²³ Post, p. 190.

²⁴ Under the English Factors' Act (52 & 53 Vict. c. 45), "mercantile agents," as therein defined, have peculiar powers with respect to the disposition of goods. Post, p. 322, note 33.

²⁵ Post, p. 437.

²⁷ Post, p. 410.

²⁶ Post, p. 179.

²⁸ Post, p. 222.

kers,²⁹ whose business it is to make bargains for others or to bring persons together to bargain; auctioneers,³⁰ whose business it is to sell property at public sale; attorneys at law,³¹ whose business it is to act for others in litigation or other legal proceedings; bank cashiers,³² who are the chief executive officers of banks, and through whom the financial operations of banks are transacted; and shipmasters,³³ who are agents for many purposes during the voyage.

Partners.

The law of partnership is closely connected with the law of agency, for a partner virtually embraces the character of a principal and of an agent. Indeed, it is often difficult, upon particular facts, to determine whether the resulting relation is one of partnership or of mere agency.³⁴ It is impossible, however, to lay down rules of practical value for the determination of these questions without entering far into the field of partnership, and for their determination the reader is referred to the books which treat of that branch of the law.

Scope of Book.

[The principal questions in the law of master and servant, as distinguished from the law of principal and agent, relate to the liability of the master for the torts of his servant to strangers and to fellow servants, and his liability to his servants for his own torts, and involve such matters as the distinction between a servant and an independent contractor, the temporary transfer of service, compulsory employment, the fellow servant rule and vice principal doctrine, and the servant's assumption of risks. Many of the rules here applicable have little or no application to questions of agency in which the relation of master and servant is not involved. It is therefore possible to a great extent to treat of the law of principal and agent without entering upon these ques-

²⁹ Post, p. 224.

³¹ Post, p. 227.

³³ Post, p. 221.

³⁰ Post, p. 225.

³² Post, p. 220.

³⁴ George, Partn. 8.

tions, and it is convenient to do so here, because the body of the law relating to master and servant, both in relation to agency and other matters, is so large as to demand a fuller treatment than it would be possible to give to it if included in the present volume. The reader is referred to treatises upon master and servant, torts, and negligence ²⁵ for a consideration of the topics excluded from the present treatment.

Outline of Treatment.

Growing out of the formation of the relation of principal and agent, and out of the execution or attempted execution of the authority conferred, mutual rights and obligations arise, or may arise, between three sets of persons: (1) Between the principal and the agent; (2) between the principal and third persons with whom the agent deals; and (3) between the agent and such third persons.

In the order of treatment adopted, however, the discussion of the rights and obligations between the principal and the agent will follow that of the rights and obligations of the second and third sets of persons. But before proceeding to a consideration of the results of the relation it will be necessary to consider the manner in which it may be formed and terminated, and some other matters, which can more conveniently be dealt with in that connection.

²⁵ In the Hornbook Series: Jaggard, Torts; Hale, Torts; Barrows, Negligence.

CHAPTER II.

CREATION OF RELATION OF PRINCIPAL AND AGENT— APPOINTMENT.

4. Creation of Relation.
5. Estoppel.
6. Agency by Appointment.
7. Form of Appointment.
8. Appointment to Execute Deed.
9. Agency by Estoppel.
10. Agency from Necessity.

CREATION OF RELATION.

4. The relation of principal and agent may be created—
 - (1) By appointment;
 - (2) By ratification.

ESTOPPEL.

5. A person may, by his words or conduct, be estopped as against a third person to deny that another person is his agent.

Except under the peculiar circumstances, when an agency is sometimes said to be created by operation of law or of necessity,¹ the relation of principal and agent is founded upon agreement or mutual assent.² The assent of the principal may be given before performance of the agent's act; that

§§ 4-5. ¹ Post, p. 39.

² Pole v. Leask, 33 L. J. Ch. 155, 161; Marwick v. Hardingham, 15 Ch. D. 349; Graves v. Horton, 38 Minn. 66, 35 N. W. 568; McGoldrick v. Willits, 52 N. Y. 612, 617; Green v. Hinkley, 52 Iowa, 633, 8 N. W. 688; First Nat. Bank v. Free, 67 Iowa, 11, 24 N. W. 566.

Where L. by letter made an offer to B., and referred him to M. as L.'s agent, but failed to instruct M., and B. communicated his acceptance to M., who declined to act for want of instructions,

is, by appointment of the agent.³ Or it may be given after performance; that is, by ratification.⁴ Mutual assent is not essential, it is true, to create a so-called agency by estoppel,⁵ but in that case the relation of principal and agent does not actually exist, although as against a third person who has been led to deal with the supposed agent in the belief that it exists the principal is estopped to deny its existence.

AGENCY BY APPOINTMENT.

6. The appointment of an agent may be express or implied. It may be effected (a) by a contract of employment, or (b) by request of the principal for performance of an act, followed by the entrance by the agent upon its performance.

The agreement which forms the basis of the relation of principal and agent is commonly called a contract of agency.¹ It must be borne in mind, however, that the legal consequences of the relation are twofold. On the one hand it results from the relation that the act of the agent within the scope of the agency is, as against third persons, the act of the principal. On the other hand, from the relation result, as between principal and agent, certain mutual obligations,² as the duty on the part of the principal to compensate and in-

L. was not bound by the intended acceptance. *Barr v. Lapsley*, 1 Wheat. (U. S.) 151, 4 L. Ed. 58.

"An agency is created—authority is actually conferred—very much as a contract is made. i. e., by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them." *Central Trust Co. v. Bridges*, 6 C. C. A. 539, 57 Fed. 753, 764, per Taft, J.

¹ Post, § 6.

⁴ Post, p. 36.

⁵ Post, p. 34.

§ 6. ¹ Evans, Ag. 2; Mecham, Ag. § 3. See definitions of Agency, ante, p. 3, note.

² Post, pp. 395-476.

demnify the agent, and the duty on the part of the agent to obey instructions, to exercise due care, and to account. So far as concerns the liability of the principal to third persons, it is wholly immaterial whether the agreement between principal and agent has the character of a contract or falls short of contract. It is not even necessary, indeed, that the agent have capacity to contract.³ The principal is bound by the act of the agent simply because he has authorized it. On the other hand, the mutual obligations of principal and agent rest largely, if not wholly, upon contract, express or implied. Thus, though a principal may be bound by the act of an agent who is devoid of contractual capacity, he could not, because of the absence of a valid contract, maintain an action against the agent for failure to obey instructions, nor could the agent maintain an action to recover compensation.

The appointment of an agent may be effected by a contract whereby the principal promises to employ and compensate the agent and the agent promises to act as such, or it may be effected by the mere request or permission of the principal followed by the agent's entrance upon performance of the act requested.⁴ In the first case the relation of principal and agent is at once created. The principal may, indeed, before performance by the agent, revoke the authority and terminate the relation,⁵ or the agent may terminate it by renouncing the authority,⁶ subject in either case to the right of the other to recover damages for breach of the contract of employment; but until revocation or renunciation any act of the agent within the scope of the agency is binding upon the principal and the mutual obligations of principal and agent subsist. The agreement, to be a contract and mutually binding, must, of course, be founded upon consideration, although without consideration it would still be operative as a request. In the second case, where no contract is entered into in advance, but the agent acts in pursuance of

³ Post, p. 105.

⁴ Anson, *Contr.* 332, 333.

⁵ Post, p. 136.

⁶ Post, p. 136.

request or permission, the relation of principal and agent does not arise until the agent has entered upon performance. The request may take the form of an offer to compensate the agent if he will perform an act;⁷ or it may be a simple request without offer of compensation, but from which the law, if there are no circumstances to negative the implication, will imply an offer of reasonable compensation.⁸ In either case, if the agent enters upon performance of the act, he thereby signifies his acceptance of the offer, and if he be competent to contract a contract of agency is formed; but, whether he be competent or not, the act performed is binding upon the principal.

Gratuitous Agency.

An executory agreement of employment, which contemplates gratuitous services on the part of the agent, is without consideration and nudum pactum.⁹ No obligation arises under it, up to the moment it is acted upon.¹⁰ Of course, consideration for the agent's promise is material only so far as it affects the mutual obligations of principal and agent, since want of consideration cannot affect the liability of the principal towards third persons for acts which he has authorized.¹¹ Once acted upon, the authority to that extent is ir-

⁷ *Roberts v. Ogilby*, 9 Price, 269.

⁸ *Van Arman v. Byington*, 38 Ill. 443. Cf. *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559; *Hertzog v. Hertzog*, 29 Pa. 465. Post, p. 442.

⁹ *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Wilkinson v. Coverdale*, 1 Esp. 75. Cf. *Elsee v. Gateward*, 5 T. R. 173; *Balfe v. West*, 13 C. B. 466; *Benden v. Manning*, 2 N. H. 289.

¹⁰ "The law on this point is somewhat obscure. Perhaps it may best be explained by saying that, where a man undertakes to act as agent or do any other service for another gratuitously, the contractual liability does not arise till he has entered upon the work and so affected the position of his employer; and that up to that moment there is nothing but a request to him to do the work importing a promise to indemnify him for losses which may be incurred if he do it." *Anson, Contr.* 333.

¹¹ *Hauptzok v. Railway Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739 (master and servant); *Huffcut, Ag.* § 28.

revocable, and the act performed is binding upon the principal. The rule is accordingly laid down that a gratuitous agent is not liable for nonfeasance, but is liable for misfeasance; in other words, that until he has entered upon the work he is under no obligation, but that if he has entered upon it, and so affected the position of his employer, he becomes liable for negligence in performance.¹² Thus, one who has gratuitously undertaken to procure insurance for another incurs no liability by failure to insure, but if he proceeds to carry his undertaking into effect by getting a policy, and does it so negligently that the other cannot recover upon the policy, he is liable to an action.¹³ How far the measure of the skill and care which the gratuitous agent who enters upon performance owes to his principal is affected by the fact that the agency is gratuitous will be considered later.¹⁴

¹² *Wilkinson v. Coverdale*, 1 Esp. 75; *Walker v. Smith*, 1 Wash. C. C. (U. S.) 152, Fed. Cas. No. 17,080; *Williams v. Higgins*, 30 Md. 404; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470; *Spencer v. Towles*, 18 Mich. 9; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766.

¹³ In *Thorne v. Deas*, 4 Johns. (N. Y.) 84, where a part owner of a vessel, at the request of another part owner, gratuitously undertook to get the vessel insured, but neglected to do so, and the vessel was lost, it was held that no action lay. Kent, C. J.: "Will, then, an action lie where one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for nonfeasance. Sir William Jones, in his essay on the Law of Bailments, considers this species of undertaking to be as extensively binding in the English law as the contract of *mandatum* in the Roman law, and that an action will lie for damage occasioned by the nonperformance of a promise to become a mandatary, though the promise be purely gratuitous. * * * He has not produced a single adjudged case, but only some dicta (and those equivocal) from the Year Books, in support of his opinion."

¹⁴ *Post*, p. 410.

FORM OF APPOINTMENT.

7. Unless otherwise provided by statute, authority for any purpose except the execution of a deed may be conferred upon an agent by deed, by writing, by word of mouth, or by conduct.

APPOINTMENT TO EXECUTE DEED.

8. Authority to execute a deed must be conferred by instrument under seal, except where the deed is executed by the agent in the presence of the principal, at his request.

In General.

Ordinarily no particular form is essential to the appointment of an agent.¹ The consent or authorization of the principal may be express or implied. It may be expressed in the form of a writing under seal or power of attorney, or of informal written instrument, as by letter of instructions, or of mere oral request; or it may be implied from conduct.² Authority may be conferred by parol, not only to make ordinary simple contracts,³ but to execute bills of exchange and prom-

§§ 7-8. ¹ Story, Ag. § 45 et seq.; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Farmers' & Mechanics' Bank v. Bank, 18 N. Y. 125, 144, 69 Am. Dec. 678.

² Post, p. 32.

³ Emerson v. Manufacturing Co., 12 Mass. 237, 7 Am. Dec. 66; Shaw v. Nudd, 8 Pick. (Mass.) 9; Small v. Owings, 1 Md. Ch. 363; Wagoner v. Watts, 44 N. J. Law, 126; Kirklin v. Association, 107 Ga. 313, 33 S. E. 83; Welch v. Hoover, 5 Cranch, C. C. 444, Fed. Cas. No. 17,368; Sheets v. Selden, 2 Wall. (U. S.) 177, 17 L. Ed. 822 (to demand payment).

Under an act making signing the memorandum of association of a company equivalent to signing and sealing, an agent could sign although only verbally authorized. Eley v. Positive Government An. Ass. Co., 1 Ex. D. 88.

"At common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. Nevertheless there may be cases where the statute requires a personal signature. The common-law rule, 'qui

issory notes ⁴ and contracts for the sale of real estate.⁵ So, too, the agent's consent or acceptance of the authority may be express, or it may be implied from his acting thereunder.

Appointment to Execute Instrument under Seal.

It is an ancient doctrine of the common law that authority to execute an instrument under seal must be evidenced by an instrument of equal solemnity. Hence authority to execute a deed must be conferred by power under seal.⁶ This rule, however, does not apply to an instrument executed by another in presence of the principal, at his request.⁷ Thus,

facit per alium facit per se, will not be restricted except where a statute renders personal signature necessary." Per Blackburn, J., Reg. v. Justices of Kent, L. R. 8 Q. B. 305.

⁴ Anon., 12 Mod. 564; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160.

⁵ Heard v. Pilley, 4 Oh. App. Cas. 548; McWhorter v. McMahan, 10 Paige (N. Y.) 386; Long v. Hartwell, 34 N. J. Law, 116; Kelm v. O'Reilly, 54 N. J. Eq. 418, 34 Atl. 1073; Baum v. Dubois, 43 Pa. 260; Curtis v. Blair, 28 Miss. 809, 59 Am. Dec. 257; Johnson v. Dodge, 17 Ill. 433; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Brown v. Eaton, 21 Minn. 409; Riley v. Minor, 29 Mo. 439; Rottman v. Wasson, 5 Kan. 552. Proof of authority must be clear. Proudfoot v. Wightman, 78 Ill. 553; Bosseau v. O'Brien, 4 Biss. (U. S.) 395, Fed. Cas. No. 1,667. Where a lease need not be under seal, it may be executed by an agent authorized by parol. Lake v. Campbell, 18 Ill. 106.

⁶ Berkley v. Hardy, 8 D. & R. 102, 4 B. & C. 355; Banorgie v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Palne v. Tucker, 21 Me. 138, 38 Am. Dec. 235; Heath v. Nutter, 50 Me. 378; Cooper v. Rankin, 5 Bin. (Pa.) 613; Gordon v. Bulkeley, 14 Serg. & R. (Pa.) 331; Perry v. Smith, 29 N. J. Law, 74; Rowe v. Ware, 30 Ga. 278; Overman v. Atkinson, 102 Ga. 750, 29 S. E. 758; Elliott v. Stocks, 67 Ala. 336; Peabody v. Hoard, 46 Ill. 242; McMurtry v. Brown, 6 Neb. 368.

A partner cannot bind his firm by deed unless authorized under seal. Harrison v. Jackson, 7 T. R. 207.

⁷ Ball v. Dunsterville, 4 T. R. 313; King v. Longnor, 4 B. & Ad. 647; Hudson v. Revett, 5 Bing. 368 (filling blanks); Gardner v. Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Mutual Ben. Life Ins. Co. v. Brown, 30 N. J. Eq. 193; Meyer v. King, 29 La. Ann.

where the grantor's daughter offered to sign a deed for her mother, who assented with a nod, and her daughter signed her mother's name, "P. G., by M. C. G.," it was held that the deed was well executed. "The name being written by another hand," said Shaw, C. J., "in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act; and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself." *

It does not necessarily follow that a sealed instrument executed by an agent under parol authority is without effect. If a contract need not be by specialty, it will be valid as a

567; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Croy v. Busenbark*, 72 Ind. 48; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84. But see *Wallace v. McCollough*, 1 Rich. Eq. (S. C.) 426; *Brown, St. Frauds*, § 10 et seq. Cf. *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535, per Kent, J.

Where the name of the grantor in a deed was signed by the grantee at the grantor's request, and in his presence, and he acknowledged the deed and delivered it, he thereby adopted the signature and made the deed valid. "The validity of the deed cannot rest upon the ground of agency or ratification. If such were the case, the authority or ratification would have to be by instrument under seal. * * * An agent cannot contract with himself. He cannot, as agent for the grantor, execute a deed to himself. But he can prepare a deed running to himself, even to the signing and sealing, and if the grantor then adopts the deed, by personally acknowledging and delivering it, it will be a legal and valid instrument. But its validity rests upon the ground of adoption, not agency or ratification." Per Walton, J., *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386.

* *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740.

simple contract, notwithstanding that a seal was attached.* So a conveyance executed by an agent authorized only by parol may have effect in equity as a contract to convey, and support a suit for specific performance.¹⁰

Same—Authority to Fill Blanks.

It follows logically, from the rule that authority to execute an instrument must be of as high a nature as the instrument executed, that authority to fill blanks in an instrument under seal must be conferred by power under seal. A deed or bond, it is urged, although otherwise executed, if incomplete by reason of the omission of a material part, as the name of the grantee or obligee or the description of the premises conveyed, is a nullity, and cannot become operative until the omitted part has been inserted and the instrument afterwards duly delivered, and it is accordingly held by those courts which have jealously maintained the sanctity of a seal that authority thus to complete a sealed instrument can-

* Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Long v. Hartwell, 34 N. J. Law, 116; Wagoner v. Watts, 44 N. J. Law, 126; Dickerman v. Ashton, 21 Minn. 538; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Ledbetter v. Walker, 31 Ala. 175; Shuetze v. Bailey, 40 Mo. 69; Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 700, 43 Pac. 486, 33 L. R. A. 679; Nichols v. Haines, 39 O. O. A. 235, 98 Fed. 692. Contra, Wheeler v. Nevins, 34 Me. 54; Baker v. Freeman, 35 Me. 485.

¹⁰ Morrow v. Higgins, 29 Ala. 448; Groff v. Ramsey, 19 Minn. 44 (Gil. 24); Hersey v. Lambert, 50 Minn. 373, 52 N. W. 963; Watson v. Sherman, 84 Ill. 263; Jones v. Marks, 47 Cal. 242.

Where defendant executed a deed, leaving blanks for the name of the grantee and the price, and gave it to an agent, with instructions when he had sold the land to fill up the blanks and deliver to the purchaser, which the agent did, held that, although the instrument was inoperative as a deed because incomplete when signed and sealed, it could be enforced by the purchaser by way of specific performance as a contract of sale, it having been in legal effect signed by defendant in his name by his lawfully authorized agent, and the statute of frauds being thus satisfied. Blacknall v. Parish, 59 N. C. 70, 78 Am. Dec. 239.

not be conferred by parol.¹¹ The part filled in must, of course, be material, since if immaterial the instrument is in effect already complete, and an immaterial alteration of an instrument, not being fraudulent, does not invalidate it.¹² The strictness of the rule has, however, been mitigated by invoking the principle of estoppel, even by courts which might not be disposed to concede that authority to fill blanks may be conferred by parol. Thus it has been held that when a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized, and delivers it to an innocent grantee without knowledge, the grantor is estopped to deny that the deed as delivered was his deed.¹³ From this position it is an easy step to that of holding that the principal is estopped although the agent fills in the blanks otherwise than as authorized, if he delivers to an innocent grantee or obligee without notice from the face of the instrument or otherwise of the breach of orders.¹⁴

¹¹ *Hibblewhite v. McMorine*, 6 M. & W. 200 (overruling *Texira v. Evans*, cit. 1 Anst. 228); *United States v. Nelson*, 2 Brock. (U. S.) 64, Fed. Cas. No. 15,862; *Burns v. Lynde*, 6 Allen (Mass.) 305; *Graham v. Holt*, 25 N. C. 300, 40 Am. Dec. 408; *Davenport v. Sleight*, 19 N. C. 381, 31 Am. Dec. 420; *Preston v. Hull*, 23 Grat. (Va.) 600, 14 Am. Rep. 153; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Williams v. Crutcher*, 6 How. (Miss.) 71; *State v. Borling*, 15 Ohio, 507; *Adamson v. Hartman*, 40 Ark. 58; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 268.

¹² *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331.

¹³ *Phelps v. Sullivan*, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442. See, also, *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5.

¹⁴ Where an administrator's bond executed in blank by a surety is intrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the probate judge to insert a penal sum larger than the surety directed, and of his doing so, is so obvious that the surety must be held to take the risk of his principal's conduct, and is bound by the instrument as delivered, although delivered in disobedience of orders, if the obligee had no notice, from the face of the bond or otherwise, of the breach of orders. *White v. Duggan*, 140 Mass. 18, 2 N. E. 110,

Many courts, however, have so far recognized an exception to the rule requiring authority to execute sealed instruments to be under seal as to declare that parol authority is sufficient to authorize the filling of a blank.¹⁵ Thus, in a Min-

54 Am. Rep. 437. It is to be noticed that subsequently in *Phelps v. Sullivan*, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442, the court said: "Whether, if the agent violates the instructions in filling blanks, the grantor would not in like manner be bound, we do not discuss."

¹⁵ *State v. Young*, 23 Minn. 551; *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *Bridgeport Bank v. Railroad Co.*, 30 Conn. 274; *Wiley v. Moor*, 17 Serg. & R. (Pa.) 438, 17 Am. Dec. 696; *Duncan v. Hodges*, 4 McCord (S. C.) 239, 17 Am. Dec. 734; *State v. Pepper*, 31 Ind. 76; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Schlintz v. McManamy*, 33 Wis. 290; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132; *Cribben v. Deal*, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; *Palacios v. Brasher*, 18 Colo. 593, 34 Pac. 251, 36 Am. St. Rep. 305.

"Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or condition to a sealed instrument, the better opinion at this day is that the power is sufficient." *Drury v. Foster*, 2 Wall. (U. S.) 24, 17 L. Ed. 780, per Nelson, J. In *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90, Field, J., after quoting with approval the above dictum, observed: "But there are two conditions essential to make a deed thus executed in blank operate as a conveyance. * * * The blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In *Drury v. Foster*, supra, a married woman executed and acknowledged a mortgage on her land, with the name of the mortgagee and the amount in blank, and intrusted it to her husband to secure a loan for a few hundred dollars. He borrowed \$12,800 of plaintiff, filling in his name and the amount, plaintiff being ignorant that the items were inserted before execution, and the wife being ignorant of the amount borrowed and receiving no benefit. It was held, in an action to foreclose, that these facts furnished her a defense. "By the laws of Minnesota," said the court, "an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a feme covert, is an essential prerequisite to the conveyance of her real estate. * * * And she is disabled from executing or acknowledg-

nesota case,¹⁶ Mitchell, J., said: "Whatever may formerly have been the rule, * * * we think the better opinion, both on principle and authority, is that parol authority is adequate and sufficient to authorize an addition to, or alteration of, even a sealed instrument. At the present day, the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsustained by reason. The courts have, for nearly a century, been gradually doing away with the former distinctions between these two classes of instruments, and if they have not yet wholly disappeared it simply proves the difficulty of disturbing a rule established by long usage, even if the reason for the rule has wholly ceased to exist.

ing a deed by procuration, as she cannot make a power of attorney. * * * We agree if she was competent to convey her real estate by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, that its validity should not well be controverted. * * * But there are two insuperable objections to this view in the present case: First, Mrs. Foster was disabled in law from delegating a person, either in writing or parol, to fill up the blanks and deliver the mortgage; and, second, there could be no acknowledgment of the deed, within the requisitions of the statute, until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The act of the feme covert and of the officers were nullities."

Where a wife, with her husband, signed a note running to plaintiff, and delivered to her husband a mortgage blank as to description, which he represented was to cover his land, and he inserted the description of her land, and plaintiff, without notice of the fraud, advanced the money thereon, the wife was bound by the acts of her husband. *Nelson v. McDonald*, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71.

¹⁶ *State v. Young*, 23 Minn. 551.

"Considering that the assumed difference [between bonds and simple contracts] rests on a merely technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535, per Kent, J.

We therefore hold that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way in which it might be given in case of an unsealed instrument." It was also held that the authority might be implied as well as express. In this view it can make no difference that the grantee or obligee have knowledge that the blanks have been filled by the hand of the agent, provided, at least, they have been filled in accordance with the authority conferred;¹⁷ nor will the principal be heard to assert, as against an innocent grantee without notice that the instrument has been completed by the hand of the agent, that the agent has violated his instructions.¹⁸

¹⁷ In *State v. Young*, 23 Minn. 551, it was held that the sureties were bound upon a county treasurer's bond executed by them while it contained a blank for the penal sum. The instrument was delivered by the treasurer to the county auditor, that it might be presented by him to the board of county commissioners for their approval and acceptance, and the amount of the penalty was filled in by him by direction of the board, and after approval by the county attorney the instrument was accepted by the board as the official bond of the treasurer. It was urged that authority to the board to insert the amount could not be implied, because the sureties did not in fact know of the existence of the blank. Mitchell, J., said: "The board had a right to presume that the sureties knew * * * there was an apparent implied authority to the board, upon which they had a right to act, and, having thus acted, the sureties cannot now be heard to say that they did not know of the existence of the blank. In other words, they are now estopped from denying the existence of the apparent and presumptive state of facts which they, by their conduct, have authorized the board to believe and act upon; and now the apparent authority with which they have clothed the board must be held to be the real authority."

¹⁸ *Nelson v. McDonald*, 80 Wis. 605, 50 N. W. 893, 27 Am. St. Rep. 71; *Butler v. United States*, 21 Wall. (U. S.) 272, 22 L. Ed. 614; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470.

Appointment to Execute Writings not under Seal—Statute of Frauds.

At common law all contracts were comprised under the heads either of specialties or of parol contracts, nor was there recognized any such third class as contracts in writing.¹⁹ All contracts merely written, and not specialties, were parol contracts, and authority to execute them might, as we have seen,²⁰ be conferred without writing. Statutes, indeed, often require particular classes of contracts to be in writing; but, even where this is the case, unless the statute expressly or by implication provides otherwise authority to execute such contracts may generally, as at common law, be conferred by word of mouth.²¹

The provisions in the statute of frauds²² in respect to the authority of agents to execute the writings thereby required are of two sorts. Under the first and third sections, which relate to the creation, transfer, and surrender of estates or interests in land, the writings required, if executed by agents, must be signed by "agents thereunto lawfully authorized by writing."²³ In the United States, as well as in England to-day,²⁴ the creation, assignment, and surrender of estates or interests in land, with the common exception of leases for a term not exceeding one year, are by statute required to be by deed, and it is therefore necessary that agents should be

¹⁹ *Rann v. Hughes*, 7 T. R. 350, n.; *Pollock, Contr.* (3d Ed.) 186.

²⁰ *Ante*, p. 20.

²¹ *Ely v. Positive Government L. Ass. Co.*, 1 Ex. D. 88.

²² 29 Car. II. c. 3.

²³ Where the statute requires that the agent must be authorized in writing, it has been held that the statute is not satisfied by a signature by another, in presence of the principal, at his verbal request. *Wallace v. McCullough*, 1 Rich. Eq. (S. C.) 426. Cf. *Bramel v. Byron* (Ky.) 43 S. W. 695; *Billington v. Com.*, 79 Ky. 400; *Dickson's Adm'r v. Luman*, 93 Ky. 614, 20 S. W. 1038. But the weight of authority appears to be opposed to this view. *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740, and cases cited *ante*, p. 21, note. See *Browne, Stat. Frauds* (5th Ed.) § 12b.

²⁴ 8 & 9 Vict. 106.

appointed under seal.²⁵ On the other hand, under the fourth section of the statute of frauds, which relates to special promises of executors and administrators to answer out of their own estate, special promises to answer for the debt, default, or miscarriage of others, agreements made upon consideration of marriage, contracts or sales of lands and interests in land, and agreements not to be performed within one year, and which requires the agreement, or some memorandum or note thereof, to be in writing, the writing may be signed by the party to be charged, "or some other person thereunto by him lawfully authorized." So, too, under the seventeenth section, relating to contracts for the sale of goods, wares, and merchandises for the price of £10 or over, the note or memorandum which is one of the means by which the statute may be satisfied may be signed by an agent "thereunto lawfully authorized." Under the fourth and seventeenth sections in England and in America, in those states where the substance of these sections has been re-enacted, it is held that the manner in which the agent may be "lawfully authorized" is left to the rules of the common law, and hence that the agent need not be authorized by writing, and that any form of ratification is sufficient.²⁶ In some states, however, and especially with reference to contracts for the sale of land, it is enacted that the authority must be in writing.²⁷

²⁵ Ante, p. 21.

²⁶ *McLean v. Dunn*, 4 Bing. 722; *Emmerson v. Heells*, 2 Taunt. 38; *Soames v. Spencer*, 1 Dowl. & R. 32; *Hawkins v. Chace*, 19 Pick. (Mass.) 502, 505; *Batturs v. Sellers*, 5 Har. & J. (Md.) 117, 9 Am. Dec. 492; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Conaway v. Sweeney*, 24 W. Va. 643; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345; *Wiener v. Whipple*, 53 Wis. 298, 302, 10 N. W. 433, 40 Am. Rep. 775. But see *Simpson v. Com.*, 89 Ky. 412, 12 S. W. 630.

²⁷ *Chappell v. McKnight*, 108 Ill. 570; *Gerhart v. Peck*, 42 Mo. App. 644; *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360; *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 103.

Where the owner authorized an agent in writing to sell land, and he made a sale on terms more favorable to the purchaser, and

It is to be observed that contracts for the employment of agents, if by the terms of the contract the employment is to continue for more than one year, or if performance within the year is impossible, are governed by the fourth section of the statute of frauds, and the agreement, or some memorandum or note thereof, must be in writing.²⁸

Appointment by Corporation.

It was formerly declared to be a rule, though not without exceptions, that a corporation can act only under its common seal,²⁹ and hence that the appointment of an agent to act for a corporation must be by instrument under the corporate seal. In England a distinction has become established between trading and nontrading corporations, and the rule at the present day appears to be that the appointment of an agent by a nontrading corporation must be under the common seal, except in cases where the application of the rule would cause very great inconvenience, or tend to defeat the

the owner orally agreed to the change, the contract of sale was not enforceable, since the agent was not authorized in writing to make it. *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416.

²⁸ *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Huntingfield*, 1 C., M. & R. 20; *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318.

Otherwise if the agreement be for performance of services until the happening of a contingency which may happen within the year. *Updike v. Ten Broeck*, 82 N. J. Law, 105; *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502.

An agreement to work for a company "for a term of five years, or so long as A. shall continue to be agent for the company." *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46.

An agreement to employ a person so long as he may be disabled from an injury. *East Tennessee, V. & G. R. Co. v. Staub*, 7 Lea (Tenn.) 397. Concerning agreements not to be performed within one year, see *Browne*, Stat. Frauds, § 272 et seq.; *Clark*, Contr. 108 et seq.

²⁹ *East London Water W. Co. v. Bailey*, 4 Bing. 283; 1 Bl. Com. 475; *Story*, Ag. §§ 52, 53.

very object for which the corporation was created,³⁰ but that a trading corporation may appoint an agent by parol for any purpose within the scope of the objects of its incorporation.³¹ In the United States the early rule has been entirely repudiated, and it is held that a corporation may contract³² and may confer authority upon agents for the performance of any act within the scope of its corporate powers in the same manner as an individual may do, and that the use of the corporate seal is not necessary unless the contrary be expressly provided by its charter or by some statute.³³ Nor is it necessary that an appointment to execute a deed be under seal. Authority to authorize the conveyance of the company's property is usually vested in the board of directors or other governing body, and may be conferred by mere vote or resolution of the board.³⁴

³⁰ *Church v. Imperial Gaslight Co.*, 6 Ad. & E. 846; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815.

³¹ *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617, affirming L. R. 3 C. P. 463; *Henderson v. Australian Steam Navigation Co.*, 5 El. & Bl. 409; *Wright, Prin. & Ag.* 24-30; *Bowstead*, Ag. art. 24.

³² *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. Ed. 351; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.

³³ *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Peterson v. City of New York*, 17 N. Y. 449; *Sherman v. Fitch*, 98 Mass. 50; *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264; *Warren v. Insurance Co.*, 16 Me. 439, 33 Am. Dec. 674; *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361; *Rockford, R. I. & St. L. R. Co. v. Wilcox*, 66 Ill. 417; *Southgate v. Railroad*, 61 Mo. 89; *Smiley v. City of Chattanooga*, 6 Helsk. (Tenn.) 604; *Crowley v. Mining Co.*, 55 Cal. 273; *Morawetz, Corp.* §§ 338, 504.

³⁴ *Burrill v. Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; *Savings Bank v. Davis*, 8 Conn. 191; *Inhabitants of Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22; *Hopkins v. Turnpike Co.*, 4 Humph. (Tenn.) 403.

Implied Appointment.

The appointment of an agent may be implied as well as express; that is, it may be evidenced by conduct as well as by words. Authority to act as agent will be implied whenever the conduct of the principal is such as to manifest his intention to confer it.³⁵ The so-called implication is of course nothing more than a logical inference from facts, and must be distinguished from an estoppel.³⁶ Authority will

³⁵ *Pole v. Leask*, 33 L. J. N. S. Ch. 155, 161; *Farmers' & Mechanics' Bank v. Bank*, 16 N. Y. 125, 145, 69 Am. Dec. 678; *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 87; *Robinson v. Green*, 6 Har. (Del.) 115; *Kent v. Tyson*, 20 N. H. 123; *Meador v. Page*, 39 Vt. 306; *Matteson v. Blackmer*, 46 Mich. 393, 9 N. W. 445; *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061; *Gibson v. Hardware Co.*, 94 Ala. 346, 10 South. 304.

"No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him." *Pole v. Leask*, *supra*, per Lord Cranworth.

Proof that one has acted for a considerable time as agent is *prima facie* proof of agency, since such conduct would naturally come to the knowledge of the principal, and the absence of dissent justifies the inference that it was authorized. *Neibles v. Railroad Co.*, 37 Minn. 151, 33 N. W. 322; *Rockford, R. I. & St. L. R. Co. v. Wilcox*, 66 Ill. 417; *Singer Mfg. Co. v. Holdford*, 86 Ill. 455, 29 Am. Rep. 43; *Reynolds v. Collins*, 78 Ala. 94; *Anderson v. Supreme Council*, 135 N. Y. 107, 31 N. E. 1092.

³⁶ "And because one dealing with an agent may show actual authority in him—that is, such authority as the principal in fact intended to vest in the agent, although such intention is to be shown by acts and conduct, rather than by express words—without showing that he (the person dealing with the agent) knew when he dealt with him of the acts and conduct from which the intention is to be implied, it was competent for defendant to show the course and manner of conducting business in the office of plaintiff. * * * Such manner of conducting the business in the office might have been proved as would have justified the jury in finding that the officers must have known of the custom of the bookkeeper and the cashier

not be conclusively presumed unless the evidence is inconsistent with any other inference. Thus where an agent repeatedly performs acts not expressly authorized, which the principal adopts without question, his conduct readily gives rise to the inference that he desires the agent to perform other acts of the same kind, and may hence be evidence of intention to vest the agent with authority to perform them. The weight of such evidence depends upon the circumstances of each case, and the nature of the relations between the principal and agent, and its effect will, of course, be overcome by any clear expression of a contrary intention.³⁷ But where there has been a long course of dealing between agent and principal, during which the agent's authority has never been questioned, the acquiescence of the principal is strong, if not conclusive, evidence of authority to perform other acts similar to those adopted.³⁸

In regard to the checks; and had that been found, and that it was acquiesced in by plaintiff, the intention to vest authority might have been implied. For the sake of convenience, we must make a distinction between implied authority—that is, such as the principal in fact intends the agent to have, though the intention be implied from the acts and conduct of the principal—and apparent authority—that is, such as, though not actually intended by the principal, he permits the agent to appear to have. The rule as to apparent authority rests essentially on the doctrine of estoppel." *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061, per Gillilan, C. J.

³⁷ Recognition of authority in a single instance may be so comprehensive as to be sufficient. *Wilcox v. Railroad Co.*, 24 Minn. 269. Cf. *Green v. Hinkley*, 52 Iowa, 633, 3 N. W. 688; *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568.

³⁸ *Farmers' & Mechanics' Bank v. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Olcott v. Railroad Co.*, 27 N. Y. 546, 560, 84 Am. Dec. 298; *Johnson v. Stone*, 40 N. H. 197, 201, 75 Am. Dec. 706; *Gulick v. Grover*, 33 N. J. Law, 463, 467, 97 Am. Dec. 728; *Fisher v. Campbell*, 9 Port. (Ala.) 210; *Odiorne v. Maxcy*, 15 Mass. 39; *Walsh v. Pierce*, 12 Vt. 130; *Wheeler v. Benton*, 67 Minn. 293, 69 N. W. 927.

AGENCY BY ESTOPPEL.

9. Where a person, by words or conduct, represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency, as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.¹

It is a general rule that where a person, by words or conduct, causes another to believe in the existence of a certain state of facts, and to act upon that belief, he will be estopped, as against the other, to allege a different state of facts. Hence, while a person cannot become the agent of another without his consent, the other, if he has represented that an agency exists, may be estopped to deny its existence.² The representation may be by words or conduct. To raise an estoppel against the person sought to be charged as principal, it is not necessary that the representation be made with the actual intention that it be acted upon by the other; it is enough if, whatever the real intention, the representation be so made that the other, acting as a reasonable man, will have cause to believe, and does believe, that it is meant to be acted upon, and does act in reliance upon it.³

§ 9. ¹ Cf. Bowstead, Dig. Ag. art. 8.

² *Pickard v. Sears*, 6 Ad. & E. 469; *Bronson's Ex'r v. Chappell*, 12 Wall. (U. S.) 681, 20 L. Ed. 436; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79.

Where a principal knows that a stranger is dealing with his agent under the belief that all statements of the agent are warranted by the principal, and allows the stranger to expend money in that belief, he will not be allowed to set up the want of authority. *Remsden v. Dyson*, L. R. 1 H. L. 129.

³ *Freeman v. Cook*, 2 Ex. 654; *Reynall v. Lewis*, 15 M. & W. 517; *Carr v. London & N. W. Ry. Co.*, L. R. 10 C. P. 307, 317; *Bradish v. Belknap*, 41 Vt. 172; *Page v. Methfessel*, 71 Hun, 442, 25 N. Y. Supp. 11; *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423; *Gibson v. Hardware Co.*, 94 Ala. 346, 10 South. 304; *Johnson v. Hurley*, 115 Mo. 513, 22 S. W. 492.

The principal may even be estopped where the representation of authority is due to his own failure to observe reasonable care.⁴ The other party must act in reliance upon the apparent authority and in good faith.⁵ This apparent agency, which to this extent is treated as a real agency, has been termed an "agency by estoppel."⁶ An agency by estoppel may arise, not only where no agency at all exists, but where an agent has acted in excess of his authority; for if the principal has represented that his agent has authority to perform a particular act, he will be equally estopped to deny the existence of the particular authority. Independently of estoppel, however, the principal may be bound by the contracts and representations of his agent within the scope of the authority usually confided to an agent employed in the capacity in which the agent is employed, provided the person dealing

⁴ *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061; *Quinn v. Dresbach*, 75 Cal. 159, 10 Pac. 762, 7 Am. St. Rep. 138; *Holt v. Schneider*, 57 Neb. 523, 77 N. W. 1096; *Witcher v. Gibson*, 15 Colo. App. 163, 61 Pac. 192.

Payment to a person found in a merchant's counting house, and appearing to be intrusted with the business there, is good, though he be not in the merchant's employ. "The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority." Per Lord Tenterden, *Barrett v. Deere*, Moo. & M. 200.

A principal is not liable for acts of his agent outside the scope of the agency, unless, with knowledge of such acts, he has given others reasonable cause to believe that the agent had authority to do such acts. *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 241.

⁵ *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; *Clark v. Dillman*, 108 Mich. 625, 66 N. W. 570; *First Nat. Bank v. Bank*, 56 Neb. 149, 76 N. W. 430.

The person relying on the apparent authority must use reasonable diligence to ascertain the facts. *Ladd v. Town of Grand Isle*, 67 Vt. 172, 31 Atl. 34.

⁶ *Pole v. Leask*, 33 L. J. N. S. Ch. 155, 162; *Anson*, Contr. 335.

with the agent has not notice that he is exceeding his authority.⁷

In most cases of agency by estoppel the representation is based upon the conduct of the alleged principal in holding out another as his agent. And frequently the same evidence which establishes a representation of authority by conduct as the basis of an estoppel is sufficient to establish an agency by implied appointment. Thus, as has been shown,⁸ the repeated adoption by the principal of the unauthorized acts of an agent is evidence of authority to the agent to perform other similar acts, and it is open to a person who has dealt with an agent to prove his authority by such evidence, although he was not aware of the prior course of dealing between principal and agent when he so dealt. If, however, the acts previously adopted by the principal were done in dealings with the person seeking to charge him, so as to amount to a representation of authority made to him, or were so notorious as to amount to a public representation of authority, and he has dealt with the agent in reliance upon such representation, it is immaterial that the principal may be able to overcome the implication of actual authority, since an agency by estoppel has been established.⁹

Same—Illustrations.

Most frequently an agency by estoppel is based upon a recognition by the principal of the agent's authority in prior dealings.¹⁰ If a man allows his servant habitually to buy from a tradesman on credit, his conduct is an implied rep-

⁷ Post, p. 180.

⁸ Ante, p. 83.

⁹ Columbia Mill Co. v. Bank, 52 Minn. 224, 53 N. W. 1061; Bradish v. Belknap, 41 Vt. 172.

¹⁰ Trueman v. Loder, 11 Ad. & E. 589; Dodsley v. Varley, 4 P. & D. 448; Summers v. Solomon, 7 El. & B. 879; Farmers' & Mechanics' Bank v. Bank, 16 N. Y. 125, 145, 69 Am. Dec. 678; Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424; Columbia Mill Co. v. Bank, 52 Minn. 224, 53 N. W. 1061; Quinn v. Dresbach, 75 Cal. 159, 12 Pac. 762, 7 Am. St. Rep. 138.

resentation of authority to pledge his credit in similar cases. "If a tradesman has dealt with the wife upon credit of the husband, and the husband has paid him without demurrer in respect to such dealings, the tradesman has the right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume."¹¹ Or if a merchant is aware that his cashier is in the habit of indorsing and collecting checks without authority in dealing with the bank, and does not notify the bank that the cashier is acting without authority, he will not be allowed to deny the authority.¹² And, generally, conduct which has the appearance of holding out another as agent for any purpose is a sufficient representation of authority to create an estoppel within the scope of the agency represented to exist,¹³ as where one permits or acquiesces in the use of his name by another in carrying on business,¹⁴ or places another upon his premises in apparent charge of the business ordinarily there conducted,¹⁵ or in apparent charge of the business which it might reasonably be inferred would be con-

¹¹ *Debenham v. Mellon*, 5 Q. B. D. 304.

¹² *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061.

¹³ *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *Hoe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425; *Summerville v. Railroad Co.*, 62 Mo. 391; *Thompson v. Clay*, 60 Mich. 627, 27 N. W. 609; *Hardin v. Insurance Co.*, 90 Va. 413, 18 S. E. 911; *Hill v. Waud*, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288; *Webster v. Wray*, 17 Neb. 579, 24 N. W. 207; *Griggs v. Selden*, 58 Vt. 561, 5 Atl. 504.

¹⁴ *Gilbralth v. Lineberger*, 69 N. C. 145; *St. Louis & M. Packet Co. v. Parker*, 59 Ill. 23 (permitting another to advertise as agent). Cf. *Pilot v. Craze*, 52 J. P. 311.

¹⁵ *Barrett v. Deere, Moo. & M.* 200; *Summers v. Solomon*, 7 El. & B. 879; *Kent v. Tyson*, 20 N. H. 121; *Pennsylvania R. Co. v. Atha* (D. C.) 22 Fed. 920; *Thurber v. Anderson*, 88 Ill. 167; *Goss v. Helbing*, 77 Cal. 190, 19 Pac. 277.

ducted on the premises,¹⁶ or stands by and silently suffers another in his presence to perform an act or make a contract in his name.¹⁷ Where another has once been held out as agent, the principal will be estopped as against one who has dealt in reliance upon the apparent authority, notwithstanding a revocation of authority of which the latter had no notice.¹⁸

As has been pointed out,¹⁹ the principal is bound when his agent acts within the scope of the usual authority of an agent employed to do the business confided to the agent, notwithstanding undisclosed limitations upon such authority. In such case also it is said, somewhat misleadingly, that the act of the agent is within the scope of his "apparent" authority; but the elements of a technical estoppel may or may not exist, and the liability of the principal arises independently of their existence. In some of the cases which have been cited²⁰ under the head of estoppel, the liability of the principal might have been made to rest either upon estoppel or upon agency. The liability of the principal for the acts of his agent within the scope of his apparent authority, in this other sense in which the term is used, will be discussed later.²¹

¹⁶ *Johnson v. Investment Co.*, 46 Neb. 480, 64 N. W. 1100; *White v. Leighton*, 15 Neb. 424, 19 N. W. 478.

¹⁷ *Pickard v. Sears*, 6 Ad. & E. 469; *James v. Russell*, 92 N. C. 194; *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200.

Such acquiescence might also be sufficient evidence of implied authority or of ratification. *James v. Russell*, *supra*.

¹⁸ *Trueman v. Loder*, 11 Ad. & E. 589; *Hatch v. Ooddington*, 95 U. S. 48, 24 L. Ed. 339; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 663; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; *Bodine v. Killeen*, 53 N. Y. 93; *Snell v. Stone*, 23 Or. 327, 31 Pac. 663; *post*, p. 138.

¹⁹ *Ante*, p. 7.

²⁰ See *White v. Leighton*, 15 Neb. 424, 19 N. W. 478.

²¹ *Post*, p. 138.

AGENCY FROM NECESSITY.

10. In certain legal relations, under circumstances of necessity peculiar to the particular relation, the law confers upon one party thereto power to make contracts which are binding upon the other, without his authority, and in some cases against his will. Such is the power of a wife, and in some jurisdictions of a child, in case of nonsupport, to pledge the credit of the husband or father for necessities, and the power of a railway servant in some jurisdictions, in case of accident and emergency, to employ a surgeon on behalf of the railway company for an injured employé. In such cases it is frequently said that the law creates an agency from necessity.

In General.

The term "agency from necessity" is sometimes used to describe relations which, accurately speaking, are not referable to the law of agency. Such is the relation between husband and wife, considered in the next paragraph, by which, only under particular circumstances, the wife has the power to impose an obligation upon her husband, even against his will, in favor of a third person. The term "agency from necessity," as applied to such a relation, is inaccurate, because the foundation of the obligation is not to be sought in any principle of agency, and it is misleading, because necessity alone is never the foundation of agency. It is true that the ordinary powers of an agent are sometimes enlarged by the occurrence of an emergency which justifies action that would otherwise be a departure from or in excess of the authority conferred; but such extraordinary authority is to be implied from the conduct of the principal in creating an agency in which such an emergency may arise, and is hence derived from the will of the principal.¹ In cases where a so-called agency arises, independently of agreement, by operation of law, the relation may be described as agency

§ 10. ¹ Post, p. 41.

quasi ex contractu.³ In other words, the relation is not one of agency, which rests essentially upon agreement, but the obligation of the so-called principal is enforced as if an agreement actually existed. Thus, in an action against a husband to recover for necessities furnished to his wife under the circumstances mentioned in the next paragraph, the form of action is *assumpsit*, and the husband's request, although alleged, need not be proved.⁴

Agency of Wife.

A husband is bound to maintain his wife and to supply her with necessities suitable to her situation and his own condition in life, and if he fails in this duty the law gives her the right to pledge his credit for the purpose of supplying herself.⁴ This right to contract debts on his credit is strictly limited to the conditions which create it, and the husband cannot be charged at the suit of one who has assumed to deal with the wife under such circumstances without proof that the husband failed to provide suitable support, and that the articles furnished were necessities. But, if these facts are proved, the husband's liability is established notwithstanding that he may have forbidden his wife to pledge his credit, or forbidden the other party to deal with her. The husband's obligation is thus one of quasi contract, and is quite distinct from that which arises when he has expressly or by implication conferred authority upon his wife.⁵ It is frequently said that under such circumstances the law creates an agency from necessity,⁶ or a compulsory agency;⁷ but it

³ Anson, *Contr.* 335. ⁴ Benjamin v. Dockham, 134 Mass. 418.

⁴ Johnson v. Sumner, 3 H. & N. 261; Mayhew v. Thayer, 8 Gray (Mass.) 172; Prescott v. Webster, 175 Mass. 316, 56 N. E. 577; Woodward v. Barnes, 43 Vt. 330; Pierpont v. Wilson, 49 Conn. 450; Keller v. Phillips, 30 N. Y. 351; Cromwell v. Benjamin, 41 Barb. (N. Y.) 558; Watkins v. De Armond, 89 Ind. 553.

⁵ Ante, p. 16.

⁶ Johnson v. Sumner, 3 H. & N. 261; Easland v. Burchell, 3 Q. B. D. 432, 436; Woodward v. Barnes, 43 Vt. 330; East v. King, 77 Miss. 738, 27 South. 608.

⁷ Benjamin v. Dockham, 134 Mass. 418.

is apparent that the real foundation of liability is the duty of support, and the treatment of the subject in detail belongs rather to the law of husband and wife than of agency.⁸

Agency of Child.

It is very generally held that a father is under no legal obligation to support his minor child, and where this rule prevails the child has no right to pledge his father's credit, even for necessities, without express or implied authority.⁹ But in some states a contrary rule prevails, and where the father fails in his duty of support the child has a right, upon his father's credit, to supply himself with necessities.¹⁰ The same considerations applicable to the so-called agency from necessity between husband and wife apply also to this relation.

Agency of Shipmaster.

The master of a ship is invested with certain extraordinary powers, to be exercised only in cases of extreme emergency. He may, for example, where it is necessary for the prosecution of the voyage, borrow money on the credit of the ship-

⁸ See Keener, *Quasi Contr.* 22; *Bergh v. Warner*, 47 Minn. 230, 252, 50 N. W. 77, 28 Am. St. Rep. 362.

It is also his duty to bury his wife, and if he neglects it he is liable for reasonable funeral expenses incurred by another. *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Gleason v. Warner*, 78 Minn. 405, 81 N. W. 206.

A husband is liable for necessities supplied to his wife while he is insane. *Read v. Legard*, 6 Ex. 636. Or while she is unconscious. *Cunningham v. Reardon*, *supra*, per Hoar, J.

⁹ *Mortimer v. Wright*, 6 M. & W. 482; *Skelton v. Springett*, 11 C. B. 452; *Gordon v. Potter*, 17 Vt. 348; *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499; *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; *Freeman v. Robinson*, 38 N. J. Law. 883, 20 Am. Rep. 399; *McMillen v. Lee*, 78 Ill. 443; *Rogers v. Turner*, 59 Mo. 116; *Carney v. Barrett*, 4 Or. 171.

¹⁰ *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 558; *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255; *Watkins v. De Armond*, 89 Ind. 553; *Dennis v. Clark*, 2 Cush. (Mass.) 347, 352, 48 Am. Dec. 671.

owner,¹¹ or hypothecate the ship or cargo,¹² or sell part of the cargo,¹³ and he may, in case of absolute necessity, sell both ship and cargo.¹⁴ To justify such action the necessity must be established, and it must appear that it was impracticable to communicate with the respective owners. Ordinarily the authority of the master over the cargo is limited to transportation and preservation. "But he may," says Story, "under circumstances of great emergency, acquire a superinduced authority to dispose of it, from the very nature and necessity of the case. * * * The character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law."¹⁵ In view of the likelihood of the occurrence of emergencies in the course of a voyage, when communication is impossible, it would seem not unreasonable to imply from the conduct of the owners, even of the cargo, in committing their property to the care of the shipmaster, authority to act as the necessities of the case may require with regard to the interest of all concerned, and thus to rest the authority of the agent upon the implied appointment of the principal.¹⁶ But,

¹¹ *Rocker v. Busher*, 1 Stark. 27; *Johns v. Simmons*, 2 Q. B. 425; *Arthur v. Barton*, 6 M. & W. 138; *Beldon v. Campbell*, 6 Ex. 886; *McCready v. Thorn*, 51 N. Y. 454; *Stearns v. Doe*, 12 Gray (Mass.) 482, 74 Am. Dec. 608.

¹² *The Gratitude*, 3 Rob. Adm. 240; *The Hamburgh, Br. & Lush*, 253; *Kleinwork v. Casa Marittima Genoa*, 2 App. Cas. 156; *The Packet*, 3 Mason (U. S.) 255, Fed. Cas. No. 10,654; *Pratt v. Reed*, 19 How. (U. S.) 359, 361, 15 L. Ed. 660; *United Ins. Co. v. Scott*, 1 Johns. (N. Y.) 106.

¹³ *The Gratitude*, 3 Rob. Adm. 240; *Australian Steam Nav. Co. v. Morse*, L. R. 4 P. C. 222; *Hunter v. Parker*, 7 M. & W. 322; *The Australia*, Swab. 480; *Jordan v. Insurance Co.*, 1 Story (U. S.) 342, Fed. Cas. No. 7,524; *Pope v. Nickerson*, 3 Story (U. S.) 465, Fed. Cas. No. 11,274; *Gordon v. Insurance Co.*, 2 Pick. (Mass.) 249; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248. See *Abbott, Ship*, 367, 368.

¹⁴ Story, Ag. § 118.

¹⁵ Story, Ag. § 118.

¹⁶ "The character of agent of the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed something must be done, and there

whatever the source from which the extraordinary authority of the shipmaster is derived, it is peculiar to the character of his office, and affords no precedent in ordinary cases of agency.¹⁷

Agency of Railway Servant to Employ Surgeon.

An anomalous doctrine has in recent years become established in some jurisdictions, by which railway conductors, station agents, and other railway servants are deemed to be vested with authority in cases of accident to employ, on behalf of the railway company, surgeons and physicians, when their services are necessary to prevent resulting loss of life or great bodily harm to injured employés.¹⁸ This authority is held to be independent of express or implied appointment, and to be conferred by law, by reason of the pressing necessity, upon the highest railway official present

is nobody present who has authority to decide what is to be done. The master is invested by presumption of law with authority to give directions on this ground that the owners have no means of expressing their wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity does not arise." *The Hamburg, Br. & Luch.* 253.

¹⁷ *Hawtayne v. Bourne*, 7 M. & W. 595.

¹⁸ *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Evansville & R. R. Co. v. Freeland*, 4 Ind. App. 207, 30 N. E. 803; *Toledo, St. L. & K. O. R. Co. v. Mylott*, 6 Ind. App. 438, 33 N. E. 135 (lodging and care); *Arkansas S. R. Co. v. Loughridge*, 65 Ark. 907, 45 S. W. 907. See, also, *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503, 44 Am. & Eng. R. Cas. 461, note (collecting cases); *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458; *Atchison & N. R. Co. v. Reeher*, 24 Kan. 228; *Bigham v. Railway Co.*, 79 Iowa, 534, 44 N. W. 805.

Contra: *Marquette & O. R. Co. v. Taft*, 28 Mich. 289 (divided court); *Tucker v. Railway Co.*, 54 Mo. 177; *Brown v. Railway Co.*, 67 Mo. 122; *Mayberry v. Railroad Co.*, 75 Mo. 492.

See, also, *Stephenson v. Railroad Co.*, 2 Duer (N. Y.) 341; *Cooper v. Railroad Co.*, 6 Hun (N. Y.) 276; *Sevier v. Railroad Co.*, 92 Ala. 258, 9 South. 405.

when the necessity arises. The authority is limited to the necessity, and terminates when the emergency has passed.¹⁹ The reason given for the rule is the absence and consequent inability to act of some one of the company's agents authorized to make such contracts for the company,²⁰ but the rule presupposes the existence of a duty resting upon the company to care for injured employes under such circumstances.²¹ The foundation of such a duty must be sought in public policy, in view of the frequent occurrence of railway accidents at places where no one who is under any obligation to care for the injured employé, unless it be the employes of the company, is likely to be present. "We think it is their [the company's] duty," said Judge Cooley,²² "to have some officer or agent, at all times, competent to exercise a discretionary authority in such cases, and that, on grounds of public policy, they should not be suffered to do otherwise."

This duty to care for an injured employé is analogous to that of the husband to supply his wife with necessities, and

¹⁹ *Terre Haute & I. R. Co. v. Brown*, 107 Ind. 336, 8 N. E. 218; *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320; *St. Louis, A. & T. Ry. Co. v. Hoover*, 53 Ark. 377, 13 S. W. 1002; *Sevier v. Railroad Co.*, 92 Ala. 258, 9 South. 405.

²⁰ A general manager has, as incidental to his employment, authority to bind the company in such cases. *Walker v. Great Western Ry. Co.*, L. R. 2 Ex. 228. His ratification of the assumed agency of a subordinate in such cases binds the company. *Toledo, W. & W. R. Co. v. Rodriguez*, 47 Ill. 188, 95 Am. Dec. 484; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299.

The authority of the company's "police inspector" to care for injured passengers under the evidence held a question for the jury. *Langan v. Great Western Ry. Co.*, 32 L. T. N. S. 173 (criticising *Cox v. Ry. Co.*, 3 Ex. 268). See, also, *Hanscom v. Railway Co.*, 53 Minn. 119, 54 N. W. 944, 20 L. R. A. 695.

²¹ The duty does not extend to the care of passengers. *Union Pac. Ry. Co. v. Beatty*, 35 Kan. 268, 10 Pac. 845, 57 Am. Rep. 160. Or trespassers. *Adams v. Railway Co.*, 125 N. C. 565, 34 S. E. 642.

²² Dissenting, in *Marquette & O. R. Co. v. Taft*, 28 Mich. 289.

logically the so-called agency, resting upon a quasi contractual obligation, would be imposed upon the company notwithstanding its express prohibition to its agents to perform the duty. Indeed, if the duty rests upon the company, it is difficult to escape from the conclusion that it would be liable to a surgeon or physician for services rendered to an injured employé, provided the necessity were established, even without the intervention of the so-called agent. Whether the doctrine is to be extended to other dangerous employments is apparently still an open question.²³

²³ Chaplin v. Freeland, 7 Ind. App. 676, 34 N. E. 1007; Holmes v. McAllister, 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 896.

CHAPTER III.

CREATION OF RELATION OF PRINCIPAL AND AGENT (CONTINUED)—RATIFICATION.

11. Agency by Ratification.
12. What Acts may be Ratified.
13. Ratification of Forgery.
14. Conditions of Performance of Act.
15. Who may Ratify.
16. How an Act may be Ratified.
17. Knowledge of Facts.
18. Effect of Ratification.

AGENCY BY RATIFICATION.

11. The relation of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act on his behalf, but without authority or in excess of authority, with the same force and effect (subject to the exceptions hereafter stated) as if the relation had been created by appointment.

An act done by one person on behalf of another, even though in the other's name, is not his act, unless done with his assent. Under the doctrine of ratification, however, the assent may be given after as well as before the act, the person on whose behalf the act was done having the right to adopt it as his own, with its benefits and burdens, if he sees fit. Ratification, it is said, relates back, and is equivalent to previous authority. *Omnis rati habitio retro trahitur et mandato æquiparatur.*¹ This is, of course, a statement, and not an explanation, of the doctrine of ratification, which, observes Judge Holmes, "like the rest of the

§ 11. ¹ Co. Litt. 207a. Cf. Y. B. 30 Ed. 1 (Rolls' Series) 126; Bracton de Leg. 1, 171b. As to the origin of the maxim, see Story, Ag. § 239; 5 Harv. Law Rev. 11; Wambaugh, Cas. Ag. 988.

law of agency reposes on a fiction.”³ It is not confined to the relation of principal and agent, for one may ratify the act of one who has assumed to act as his servant, and thus become liable for a trespass, or render lawful ab initio an act which, but for the ratification of the person able to justify it, would be a trespass.³ The creation of an agency by ratification has been likened to the formation of a contract by acceptance of an offer of an act for a promise,⁴ but it may be doubted whether the analogy is not misleading, and it is better to disregard the language of contract, and to say simply that the proposed or quasi principal has an election to treat the act as his own or not.⁵ It must be borne in mind that the doctrine of ratification applies equally to acts of strangers who have acted without any authority whatever and to acts of agents who in the performance of particular acts have exceeded their authority.

³ 5 Harv. Law Rev. 14.

³ *Lewis v. Read*, 13 M. & W. 834; *Bird v. Brown*, 4 Ex. 786, per Rolfe, B.; *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249; *Nims v. Boys' School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; *Jaggard, Torts*, 46.

⁴ *Anson, Contr.* 333.

⁵ *Drakeley v. Gregg*, 8 Wall. (U. S.) 242, 267, 19 L. Ed. 409; *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; *Story, Ag.* § 248.

“It was nothing to do with estoppel, but the desire to reduce the law to general principles has led some courts to cut it down to that point.” O. W. Holmes, Jr., 5 Harv. Law Rev. 19.

Where a contract is ratified, no new consideration is required. *Drakeley v. Gregg*, supra; *Grant v. Beard*, 50 N. H. 129; *Pearsoll v. Chapin*, 44 Pa. 9; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634.

WHAT ACTS MAY BE RATIFIED.

12. Every act, lawful or unlawful, done by one person on behalf of another, without prior authority, which is of such a nature that if done pursuant to prior authority it would in law be his act, is capable of ratification by the person on whose behalf it is done.¹

RATIFICATION OF FORGERY.

- 13 Whether a forged instrument may be ratified by the person whose name is forged is a question upon which the authorities differ.

As a rule every act, lawful or unlawful, which is done on behalf of another without his authority, may be ratified, and when ratified is deemed to be his act, with all the burdens and benefits which would have resulted had he previously authorized it. Inasmuch as a man is liable for a tort, as well as upon a contract, if he has authorized it, he is liable if he ratifies it.² On the other hand, it may be that an act would be destitute of legal effect, or void, although performed by an authorized agent, and such an act can, of course, derive no force from ratification. Thus certain acts may not be done by an agent, and these, since they may not be delegated, may not be ratified.³ Again, certain classes of contracts, termed illegal contracts, the law prohibits, and

§§ 12-13. ¹ This section must be read in connection with section 14 (Conditions of Performance of Act) and section 18 (Effect of Ratification).

² *Hillberry v. Hatton*, 2 H. & O. 822; *Eastern Counties Ry. Co. v. Brown*, 6 Ex. 314; *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249.

Accepting goods wrongfully seized with knowledge of facts held ratification of assault committed while making seizure. *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559.

Accepting proceeds of wrongful sale of goods stored in principal's warehouse rendered him liable for conversion. *Creson v. Ward*, 66 Ark. 209, 49 S. W. 827.

³ Post, p. 58.

pronounces void,⁴ and these, since they would be destitute of legal effect by whomsoever entered into, are not the less so if made by an agent who derives his authority from ratification.⁵ Thus, in a jurisdiction where a statute prohibited contracts for the sale of intoxicating liquor, such a contract would be void, whether made by the seller or by an agent, however his authority might be conferred. So where a statute declares void contracts made in behalf of municipal bodies in violation of provisions regulating the manner of letting, ratification is unavailing to validate a contract attempted so to be made.⁶ Acts which are void cannot be ratified, but acts which are voidable may be.⁷ It follows that a contract void for illegality cannot be ratified, although at the time of ratification the act creating the illegality has been repealed.⁸ So, too, it would seem, in the case

⁴ Post, p. 90.

⁵ *United States v. Grossmayer*, 9 Wall. (U. S.) 72, 19 L. Ed. 627; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Decuir v. Lejeune*, 15 La. Ann. 569; *Spence v. Cotton Mills*, 115 N. C. 210, 20 S. E. 372.

Where a statute prohibited any officer of any corporation from being interested in any contract for furnishing supplies to it, an ordinance for supply of water to a municipality by a company of which a majority of the councilmen were directors was void, and could not be ratified by a council none of whose members was a member of the company. *Borough of Milford v. Water Co.*, 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122.

⁶ *Zottman v. City of San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Jefferson County Sup'rs v. Arrighi*, 54 Miss. 668.

⁷ *State v. Buttles' Ex'r*, 3 Ohio St. 309; *State v. Torinus*, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; *State v. Shaw*, 23 Iowa, 67; *City of Findlay v. Pertz*, 13 C. C. A. 559, 66 Fed. 427.

⁸ A contract with a corporation, which was void because not in writing, or sealed or signed by the corporate officers, as required by statute, could not be ratified, though the statute had been repealed. *Spence v. Cotton Mills*, 115 N. C. 210, 20 S. E. 372.

Conversely, it would seem that a contract which was legal when made by the assumed agent might be ratified notwithstanding a change in the law making such contracts illegal. But see *Huffcut*, Ag. § 43.

of a contract made by an assumed agent in one jurisdiction and ratified in another, the legality of the contract, and consequently its capability of ratification, depend upon the law of the former jurisdiction; but the decisions are conflicting.*

To the general rule that whatever acts may be authorized may be ratified with like effect, certain exceptions, growing out of the peculiar nature of ratification, must be noted. In cases involving the rights of strangers which have accrued between the act and the ratification, and in some cases involving the liabilities of third persons with whom the quasi agent has dealt, a strict application of the doctrine of relation would lead to unjust consequences, and in such cases ratification is denied the full effect of prior authority. These exceptions will be dealt with in treating of the effect of ratification.¹⁰

Ratification of Forgery.

Whether a forged instrument is capable of being ratified by the person whose name is forged, so as to render him liable upon it, is a question upon which the courts are divided.¹¹ The arguments against ratification are twofold—the first founded upon the circumstance that the forger does not assume to act as agent; the second founded upon public policy.

* Dord v. Bonnafée, 6 La. Ann. 563, 54 Am. Dec. 573; Golson v. Ebert, 52 Mo. 260 (statute of frauds).

"In case of a contract made in a foreign country, by an agent without authority, which the principal at home afterwards ratifies, the contract is considered as made in that foreign country, because the ratification relates back tempore et loco, and is equivalent to an original authority." Eustis, C. J., Dord v. Bonnafée, supra; Wharton, Ag. § 83. Contra, Shuenfeldt v. Junkermann (C. C.) 20 Fed. 357.

¹⁰ Post, p. 75.

¹¹ Against ratification: Brook v. Hook, L. R. 6 Ex. 89; McHugh v. Schuylkill Co., 67 Pa. 391, 5 Am. Rep. 445; Shisler v. Vandike, 92 Pa. 449, 37 Am. Rep. 702; Henry Christian Building & Loan Ass'n v. Walton, 181 Pa. 201, 37 Atl. 261, 59 Am. St. Rep. 636; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Henry v.

As we shall see,¹² it is a rule that an act, to be capable of ratification, must be done professedly on behalf of the quasi principal, by one who assumes to act as his agent, while in the case of forgery the forger does not profess to sign for the other, but, in effect, represents the signature to have been made by the person whose signature it purports to be.¹³ In answer to this objection it is suggested that although, as a rule, a man may not ratify an act unless it purports to have been done on his behalf by one who

Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613; *Owsley v. Phillips*, 78 Ky. 517, 39 Am. Rep. 258; *Kelchner v. Morris*, 75 Mo. App. 588.

In favor of ratification: *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Wellington v. Jackson*, 121 Mass. 157; *Casco Bank v. Keene*, 53 Me. 103; *Howard v. Duncan*, 3 Lans. 175; *Livingston v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Mechem, Ag.* § 116; *Wharton, Ag.* § 71. See, also, *Mackenzie v. British Linen Co.*, 6 App. Cas. 82, per Lord Blackburn.

The act of one who obtained payment by falsely representing himself as agent of the creditor might be ratified, though the act was a crime. *Scott v. New Brunswick Bank*, 23 Can. Sup. Ct. 277.

A fraudulent alteration of a promissory note cannot be ratified so as to create liability in favor of the holder who made the alteration. *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754.

¹² Post, p. 54.

¹³ "In all the cases cited for the plaintiff, the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here, if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the defendant to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act. * * * But here Jones had forged the name of the defendant to the note, and pretended that the signature was the defendant's signature; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement." *Brook v. Hook*, 6 Ex. 89, per Kelly, C. B.

assumes to act as his agent, the principle upon which the rule rests is simply that a man may not ratify an act which did not purport to be his act or done on his behalf. Ordinarily, where one man acts for another, he must act for him professedly, or else the act will purport to be his own act, and not the act of him for whom he is secretly acting. But, from the very nature of forgery, the act upon its face purports to be the act of the person whose name is forged, and this, it seems, is a sufficient basis for his adoption of the act. Thus, if a clerk, without authority, but in the honest belief that he had authority, should sign his employer's name to a check, and issue it, without disclosing the fact that the signature was not made by his employer, it can hardly be doubted that the employer could ratify it, although the assumption of agency did not appear. It is submitted that the mere undisclosed intent of the person who makes the signature, although it may make him guilty of forgery, is not a difference which should distinguish the case of forgery from the case last supposed, or which should preclude the person whose signature is forged from ratifying it, unless, indeed, he is precluded on the ground of public policy.¹⁴

¹⁴ "As to this objection, it is clear that it cannot be maintained upon the ground of the form of the signatures merely. This form of signature, though not the more usual manner of signing by an agent, does not prevent the person whose name is placed on the note from being legally holden, upon proof that the signature was previously authorized, or subsequently adopted. Various similar cases will be found, where the party has been charged, where the name of the principal appears upon the note accompanied with no indications of the fact of its having been signed by another hand. * * * Wherever such signature by the hand of another was duly authorized, and also where a note was thus executed under an honest belief by the party signing the name that he was thus authorized, we apprehend that there can be no doubt that it would be competent, in the case first stated, to maintain an action upon the same, upon proof of the previous authority thus to sign the name, or in the latter upon proving that the signature, although at the time unauthorized, was subsequently adopted and ratified by the party whose name appears as promisor. * * * The only

The argument from public policy is based upon the view that ratification of forgery, if it be sanctioned, has a tendency to stifle prosecution for the criminal offense. This tendency cannot be denied,¹⁵ but it may well be doubted whether this consideration should prevail to defeat the ordinary operation of ratification, at least where the ratification is not upon the understanding that the guilty party shall not be prosecuted.¹⁶ Of course, ratification could under no circumstances afford a defense to the forgery against an indictment.¹⁷

question upon this part of the case is whether a signature made by an unauthorized person under such circumstances as to show that the party placing the name on the note was thereby committing the crime of forgery can be adopted and ratified. * * * As to the person whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction. * * * In the first case, the actor has no authority any more than in the last. The contract receives its whole validity from the ratification. It may be ratified where there was no pretense of agency. In the other case, the individual who presents the note thus signed passes the same as a note signed by the promisor, either by his own hand, or written by some one by his authority. It was clearly competent, if duly authorized, thus to sign the note. It is, it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act." *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447, per Dewey, J.

¹⁵ "It is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution." *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613.

¹⁶ "It is, however, urged that public policy forbids sanctioning a ratification of a forged instrument, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted on the criminal offense." *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447.

¹⁷ "I wish to guard against being supposed to say that if a

Ratification is not to be confounded with estoppel. There is universal agreement that, where a person whose signature has been forged expressly or impliedly represents that it is genuine, he is estopped, as against one who has changed his position for the worse, as by giving value for a negotiable instrument, in reliance upon the representation, from denying its genuineness.¹⁸

CONDITIONS OF PERFORMANCE OF ACT.

- 14. In order to be capable of ratification, an act must be done by one who assumes to act on behalf of an existing principal, who must be named or otherwise described.**

Assumption of Agency.

No act performed by one man can be adopted by another as his own unless it was done professedly on his behalf. In other words, an act, to be capable of ratification, must, as a rule,¹ be done by one who assumes openly to act as agent.²

document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery it is in the power of the person whose name was forged to ratify it, so as to make it a defense for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible, just as if he had originally authorized it." *McKenzie v. British Linen Co.*, 6 App. Cas. 82, per Lord Blackburn.

¹⁸ *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Forsyth v. Day*, 46 Me. 176; *Orout v. De Wolf*, 1 R. I. 393; *Woodruff v. Munroe*, 83 Md. 146; *Rudd v. Matthews*, 79 Ky. 479, 42 Am. Rep. 231.

§ 14. ¹ An exception exists in case of ratification of forgery in jurisdictions where such ratification is sustained. Ante, 48.

² *Wilson v. Tumman*, 6 M. & G. 236; *Watson v. Swann*, 11 C. B. N. S. 756; *Lyell v. Kennedy*, 18 Q. B. D. 796; *Hamlin v. Sears*, 82 N. Y. 327; *Grund v. Van Vleck*, 69 Ill. 479; *Roby v. Cossitt*, 78 Ill. 638; *Ironwood Store Co. v. Harrison*, 75 Mich. 197, 42 N. W. 808; *Mitchell v. Association*, 48 Minn. 278, 51 N. W. 606; *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811, 825; *Rawlings v. Neal*, 126 N. C. 271, 35 S. E. 597.

In *Wilson v. Tumman*,³ Tindal, C. J., said: "That an act done, for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year Book, 7 Hen. 4, fo. 35,⁴ that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it, at the time, as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time." Accordingly, if A. enters into a contract with C., openly assuming to act as the agent of B., B. may ratify it; but, if A. enters into a contract in his own name with C., A. cannot confer the benefit of it upon B., or divest himself of his liability towards C., by procuring a ratification from B.⁵ It follows that a contract cannot be ratified by an undisclosed principal.⁶ Nor can a contract entered into by A. as agent for D. be ratified by B.⁷

³ 6 M. & G. 236.

⁴ Y. B. 7 H. IV, 34, pl. 1.

⁵ *Watson v. Swann*, 11 O. B. N. S. 756; *Fellows v. Commissioners*, 86 Barb. (N. Y.) 635; *Western Pub. House v. District Tp.*, 84 Iowa, 101, 50 N. W. 551; *McDonald v. McCoy*, 121 Cal. 55, 59 Pac. 421.

⁶ *Keighley v. Durant* [1901] A. C. 240, reversing *Durant v. Roberts* [1900] 1 Q. B. 629; *Fradley v. Hyland* (O. C.) 37 Fed. 49, 52, 2 L. R. A. 749.

⁷ Where A. entered into an agreement professedly on behalf of B.'s wife and C., B. could not ratify so as to give him a right to sue on it jointly with his wife and C. *Sanderson v. Griffith*, 5 B. & O. 909.

"Where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the

Existence of Principal.

The act must be performed on behalf of a quasi principal who is in existence.⁸ The most frequent application of this rule arises where the promoters of a proposed corporation enter into a contract on its behalf, intending that the contract shall take effect as its contract after its incorporation. In such case there can be no ratification.⁹ The subsequently formed corporation may, indeed, make itself liable by entering into a new contract upon the same terms as the old,¹⁰ or it may make itself liable by accepting the benefits of performance under circumstances which give rise to an implied

contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot, by a subsequent ratification, relieve him from that responsibility." *Kelner v. Baxter*, L. R. 2 Q. P. 174, per Earle, C. J.; *Richardson v. Payne*, 114 Mass. 429.

* "When ratification is admitted the original contract is imputed by a fiction of law to the person ratifying, and the fiction is not allowed to be extended beyond the bounds of possibility. Perhaps there is no solid reason for the rule, but it is an established one." *Pollock, Contr.* (3d Ed.) 118, note c.

"Putting out of view the cases of assignees of bankrupts and administrators, there is no case in which a person can by subsequent ratification make himself liable as principal, so as to discharge the agent, where the principal was not in existence at the time of the original contract." *Scott v. Lord Ebury*, L. R. 2 Q. P. 255, 267, per Willes, J.

⁸ *Kelner v. Baxter*, L. R. 2 Q. P. 174; *Scott v. Lord Ebury*, L. R. 2 Q. P. 255; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re Northumberland Ave. Hotel Co.*, L. R. 33 Ch. D. 16; *Stainsby v. Boat Co.*, 3 Daly (N. Y.) 98; *Abbott v. Hapgood*, 150 Mass. 218, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193. *Contra*: *Oakes v. Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544.

Where a corporation organized pursuant to statute, but before its articles were filed as thereby required, entered into a contract, its subsequent recognition of the contract was a ratification, although the statute declared that a corporation so organized should not commence business before such articles were filed. *Whitney v. Wyman*, 101 U. S. 393, 25 L. Ed. 1050.

¹⁰ *Howard v. Patent Ivory Co.*, 38 Ch. D. 156.

promise to pay therefor;¹¹ but such liability does not rest upon ratification and does not relate back.¹² An exception, or an apparent exception, to the rule is recognized in the case of contracts made on behalf of estates of deceased or bankrupt persons, where the title of the administrator or assignee in bankruptcy for the protection of the estate vests by relation, and the administrator or assignee, though not yet appointed, existing, as it is said, in contemplation of law, may, when subsequently appointed, ratify the contract.¹³

Designation of Principal.

Although the act must be done professedly on behalf of a principal who exists, he need not be named or even known to the agent. It is enough if he be capable of being ascertained and be described.¹⁴ Thus, a policy of insurance effected on a vessel on behalf of all persons interested may be ratified by any person who in fact was interested.¹⁵ So, a contract made on behalf of the heirs of A. or the administrator of A.'s estate, though the heirs or administrator be unknown to the person assuming to act on their behalf, may be ratified by them.¹⁶

¹¹ *Low v. Railroad*, 45 N. H. 370; *Bell's Gap R. Co. v. Cristy*, 79 Pa. 54, 21 Am. Rep. 39; *McArthur v. Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; *Paxton Cattle Co. v. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852.

¹² Hence, though a contract made on behalf of a contemplated corporation was within the statute of frauds because by its terms not to be performed within one year, a new contract implied from acceptance of performance by the corporation was not within the statute. *McArthur v. Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

¹³ *Foster v. Bates*, 12 M. & W. 226.

¹⁴ *Watson v. Swann*, 11 O. B. N. S. 756.

¹⁵ *Hagedorn v. Olliverson*, 2 M. & S. 485.

¹⁶ *Foster v. Bates*, 1 D. & L. 400, 12 M. & W. 226; *Lyell v. Kennedy*, 14 App. Cas. 437.

WHO MAY RATIFY.

- 15. Any person who would have been competent to authorize an act, performed in his behalf, when it was performed, and who would still be competent to authorize it, may ratify it.**

A person may ratify any act which he would have been competent to authorize, provided he be still competent.¹ Thus, a corporation may ratify an act within its corporate powers.² An agent, even, may ratify an unauthorized act done on behalf of his principal by another, if his powers are such that he might have authorized it.³ Within this principle, an unauthorized act done on behalf of a corporation may be ratified by its proper offices, provided the act be within the scope of the corporate powers.⁴ But since ratification of an

§ 15. ¹ *Armitage v. Wldoe*, 36 Mich. 124; *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676, 19 L. Ed. 1040.

As to the exceptional rule prevailing in marine insurance, that a person on whose behalf insurance is effected may ratify after knowledge of loss, though he would not then be able to make such a contract, see post, p. 83, note 24.

² *Fleckner v. Bank*, 8 Wheat. (U. S.) 363, 5 L. Ed. 631; *Despatch Line of Packets v. Manufacturing Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Kelsey v. Bank*, 69 Pa. 426; *Irvine v. Union Bank*, 2 App. Cas. 366; *Morawetz, Corp.* § 618. The state may ratify: *State v. Buttles' Ex'r*, 3 Ohio St. 309; *State v. Shaw*, 28 Iowa, 67; *State v. Torinus*, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395.

Where an agent of a state exceeds his authority in selling and delivering property of his principal, and taking a note for the price, the legislature may by statute, in the absence of constitutional prohibition, ratify the transaction, and enforce payment of the note. *State v. Torinus*, supra.

A municipal corporation which is without authority to issue bonds cannot validate them by ratification. *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248.

³ *Mound City Mut. Life Ins. Co. v. Huth*, 49 Ala. 530; *Palmer v. Cheney*, 35 Iowa, 281; *Ironwood Store Co. v. Harrison*, 75 Mich. 197, 42 N. W. 808; *Whitehead v. Wells*, 29 Ark. 99.

⁴ *Fleckner v. Bank*, 8 Wheat. 338, 5 L. Ed. 631; *Sherman v. Fitch*,

act can have no greater effect than previous authority to do the act, a person who is incompetent cannot ratify.⁵ Nor if he was incompetent when the act was done, so that his appointment of an agent would have been void, can he ratify it upon subsequently becoming competent.⁶ Thus, in jurisdictions where the appointment of an agent by an infant is void⁷ he cannot ratify upon coming of age,⁸ although in jurisdictions where the appointment is merely voidable he may ratify.⁹ Whether an insane person may ratify an unauthorized act after removal of his disability depends upon whether the appointment of an agent by an insane person is voidable or void.¹⁰

It is said that the principal may not ratify a contract unless he have present ability to perform it; for example, that a principal may not ratify a contract for the sale of land if he has already conveyed the land to a stranger.¹¹ Undoubted-

98 Mass. 59; *Lyndeborough Glass Co. v. Glass Co.*, 111 Mass. 315; *Kelesy v. Bank*, 69 Pa. 426.

⁵ *Doe v. Roberts*, 16 M. & W. 778; *Armltage v. Widoe*, 36 Mich. 124; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Macfarland v. Heim*, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629 (married woman). See, also, *Brady v. Mayor*, 16 How. Prac. (N. Y.) 432.

⁶ The execution by a husband of a lien on crops belonging to his wife without her joining, being void, she cannot ratify on becoming discoverer. *Rawlings v. Neal*, 126 N. O. 271, 35 S. E. 597.

⁷ Post, p. 94.

⁸ *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756.

⁹ *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697.

¹⁰ Post, p. 88.

¹¹ "It follows, also, from the general doctrine, that a ratification is equivalent to a previous authority, that a ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from the transaction, unless in a position to enter directly upon a similar transaction himself. Thus, if an individual, pretending to be the agent of another, should enter into a contract for the sale of land

ly he cannot by ratifying defeat the rights of his grantee.¹² But it seems that he may nevertheless, if he sees fit, ratify the contract, thereby making himself liable to the other party for the result of nonperformance, and to the agent, as in other cases of ratification; in other words, that he may ratify, but that the retrospective effect of the ratification will be limited by the rights which have intervened.¹³

HOW AN ACT MAY BE RATIFIED.

16. An act may be ratified by any words or conduct showing an intention upon the part of the person ratifying to adopt the act in whole or in part as his own; except that, if authority to do an act must be conferred by particular form, ratification must ordinarily be by like form.

of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone." *McCrachen v. City of San Francisco*, 16 Cal. 591, per Field, C. J.

¹² Post, p. 75.

¹³ "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive effect of the ratification is subject to this qualification: The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. * * * The question, therefore, in this case is whether any rights of third parties did thus intervene between the act of substitution by Homans and its adoption and ratification by Tullis, which defeated the retroactive efficacy of the ratification." *Cook v. Tullis*, 18 Wall. (U. S.) 332, 21 L. Ed. 933, per Field, J.

KNOWLEDGE OF FACTS.

17. Ratification is not binding upon the person ratifying unless made with knowledge of all the material facts, or unless made with the intention to ratify whatever the facts may be.

In General.

Ratification is, as we have seen,¹ the exercise of a right of election on the part of the quasi principal to adopt as his own an act done on his behalf. It is therefore an assent to accept the benefits and burdens of the act. It follows that the ratification must be of the act as a whole, or in toto, with all its burdens, or not at all.² This principle is illustrated by the rule that any conduct of the principal, with knowledge of the facts, in recognition of the transaction, is a ratification.³ Since ratification rests upon assent⁴ it is ordinarily necessary, as will be shown later, that the person ratifying have knowledge of the facts, for otherwise the assent is only apparent, and not real, and the ratification will not be binding upon him unless he intended to ratify whatever the facts might turn out to be. The assent of the principal may be shown by words or by conduct; or, in other words, it may be express⁵ or implied.⁶ No formalities are requisite. The only exception to this rule is that, where an act is one which could have been authorized only by observance of a particu-

§§ 16-17. ¹ Ante, p. 47.

² *Hovil v. Pack*, 7 East, 164; *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; *Teague v. Maddox*, 150 U. S. 128, 14 Sup. Ct. 46, 37 L. Ed. 1025; *Brigham v. Palmer*, 3 Allen (Mass.) 450; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; *Billings v. Mason*, 80 Me. 496, 15 Atl. 59; *Southern Exp. Co. v. Palmer*, 48 Ga. 85; *Eberts v. Selover*, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278; *Nye v. Swan*, 49 Minn. 431, 52 N. W. 39; *Wells v. Hickox*, 1 Kan. App. 485, 40 Pac. 821; *Key v. Insurance Co.*, 107 Iowa, 446, 78 N. W. 68.

³ Post, p. 65.

⁵ Post, p. 62.

⁴ Post, p. 62.

⁶ Post, p. 65.

lar form, that form must be observed to effect a ratification.⁷

Although a ratification once made is irrevocable,⁸ the mere fact that the principal at first refuses to recognize an unauthorized act does not prevent him from afterwards ratifying,⁹ provided the other party has not acted upon the refusal.¹⁰

Express Ratification.

Any form of words which expresses the assent of the principal to adopt an act done in his behalf is sufficient evidence of ratification.¹¹ Except in the cases mentioned in the next

⁷ Post, p. 63.

Where notes of a town could not be issued by its treasurer unless authorized by a town meeting held pursuant to notice, specifying its object, their unauthorized issue by him could not be ratified except by vote of a town meeting held pursuant to such notice. *Town of Bloomfield v. Bank*, 121 U. S. 135, 7 Sup. Ct. 865, 30 L. Ed. 923; *School Dist. No. 6 v. Insurance Co.*, 62 Me. 330.

⁸ Post, p. 76.

⁹ *Soames v. Spencer*, 1 D. & R. 32; *Woodward v. Harlow*, 28 Vt. 338.

¹⁰ *Wilkinson v. Harwell*, 13 Ala. 660. See *Fiske v. Holmes*, 41 Me. 441.

¹¹ Where an agent, without authority, signed a distress warrant, and the principal, on being informed, said that he should leave the matter in his agent's hands, this was sufficient evidence of ratification. *Haselar v. Lemogue*, 5 C. B. N. S. 530.

Where an agent entered into an unauthorized agreement, and the principal wrote that he did not know what the agent had agreed to, but that, of course, he must support him in all that he had done, the evidence of ratification was sufficient. *Fitzmaurice v. Bagley*, 6 El. & B. 868. See, also, *Merrill v. Parker*, 112 Mass. 250; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Henry Hess & Co. v. Baar*, 14 Misc. Rep. 286, 35 N. Y. Supp. 687; *Brown v. Wilson*, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779; *Fenn v. Dickey*, 178 Pa. 258, 35 Atl. 1108; *Chauche v. Pare*, 21 C. C. A. 329, 75 Fed. 283; *Blakley v. Cochran*, 117 Mich. 394, 75 N. W. 940.

Giving as a reason for repudiating a contract, unauthorized in several particulars, that it is unauthorized in a particular in which it is authorized, is not a ratification. *Brown v. Henry*, 172 Mass. 559, 52 N. E. 1073.

succeeding paragraphs, it is immaterial whether the words are spoken or written, or whether they are under seal.

Same—Ratification of Deed.

As we have seen, at common law an agent can be appointed to execute an instrument under seal only by instrument of like character.¹³ Ratification cannot stand upon a higher ground than original authority, and if the act must be under seal the ratification also must be under seal.¹⁴ Such a ratification may be effected by an instrument in terms ratifying the deed, or by a power of attorney prospective in terms, authorizing the deed, but dated back to a period anterior to the execution of the deed it is intended to ratify.¹⁴ As in case of appointment,¹⁵ if it was not essential that the instrument ratified should be under seal, the seal, though attached, being superfluous, may be disregarded, and a parol ratification is sufficient.¹⁶ An exception to the rule is gen-

¹³ Ante, p. 21.

¹⁴ *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Heath v. Nutter*, 50 Me. 378; *Despatch Line of Packets v. Manufacturing Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Grove v. Hodges*, 55 Pa. 504; *Pollard v. Gibbs*, 55 Ga. 45; *Zimpelman v. Keating*, 72 Tex. 318, 12 S. W. 177. See *Oxford v. Crowe* (1893) 3 Ch. 535.

"If the principal adopt the sale and receive the purchase money with full knowledge of the facts, it would be a ratification by estoppel." *Zimpelman v. Keating*, per Collard, J., *supra*. Cf. *Grove v. Hodges*, *supra*.

Where a wife executed a deed in blank as to the name of the grantee, the date and the consideration, and delivered it to her husband, who filled the blanks and delivered it to defendant as grantee, and she knowingly used the consideration, she thereby ratified the conveyance. *Reed v. Morton*, 24 Neb. 760, 40 N. W. 282, 1 L. R. A. 736, 8 Am. St. Rep. 247. As to authority to fill blanks, ante, p. 22.

¹⁴ *Millikin v. Coombs*, 1 Greenl. (Me.) 343, 10 Am. Dec. 70; *Riggan v. Crain*, 86 Ky. 249, 5 S. W. 561. See, also, *Rice v. McLarren*, 42 Me. 157. Contra: *Moore v. Lockett*, 2 Bibb (Ky.) 67, 4 Am. Dec. 683.

¹⁵ Ante, p. 22.

¹⁶ *Worrall v. Munn*, 5 N. Y. 229, 238, 55 Am. Dec. 330; *State v.*

erally recognized in cases of partnership, where it is held that one partner may ratify by parol a deed executed by another in the name of the firm.¹⁷ In Massachusetts the court has extended the doctrine of parol ratification to all classes of cases.¹⁸

Same—Writing not Under Seal—Statute of Frauds.

At common law all contracts which are not specialties may be ratified, as they may be authorized, by parol.¹⁹ Unless the authority of an agent to execute a simple contract is required by statute to be in writing, ratification may be by any form of parol. Even under the statute of frauds, as has been pointed out,²⁰ the requirement that the agreement or note or memorandum, if signed by some person other than the party to be charged, must be signed by some person "thereunto by him lawfully authorized" is satisfied by any form of appointment or ratification sufficient by the rules of the common law.²¹ But, where a statute enacts that the authority must be in writing, the ratification must be in like form.²²

Railroad Co., 8 S. C. 129; *Adams v. Power*, 52 Miss. 828; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634. Contra: *Pollard v. Gibbs*, 55 Ga. 45.

¹⁷ *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; *Peine v. Weber*, 47 Ill. 45.

¹⁸ *McIntyre v. Park*, 11 Gray (Mass.) 102; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146.

¹⁹ Ante, p. 20.

²⁰ Ante, p. 23.

²¹ *McLean v. Dunn*, 4 Bing. 722; *Soames v. Spencer*, 1 D. & R. 32; *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188; *Kelm v. O'Reilly*, 54 N. J. Eq. 418, 34 Atl. 1073.

²² *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; *Hawkins v. McGroarty*, 110 Mo. 550, 19 S. W. 830; *Long v. Poth*, 16 Misc. Rep. 85, 37 N. Y. Supp. 670. Contra: *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490.

Implied Ratification.

Since intention may be manifested by conduct as well as by words, ratification will be implied from any conduct showing an intention to adopt the act. Any act done in recognition of the transaction, in whole or in part, if done with knowledge of all the material facts, is evidence, and is ordinarily conclusive evidence, of ratification. If an act be done in recognition without full knowledge, its weight, as showing a ratification, will depend upon whether, in view of all the circumstances, it may reasonably be inferred that the principal intended to adopt the act at all events, but the burden is upon the person seeking to establish ratification under such circumstances.²³ The acts from which a ratification may be implied are as various as the subject-matters of agency.²⁴

Same—Accepting Benefits.

A principal who, with knowledge, accepts the benefit of a transaction, is deemed to have ratified it.²⁵ Thus, where the agent without authority makes a sale or a purchase the principal, by accepting the proceeds of the sale,²⁶ or by accepting

²³ Post, p. 73.

²⁴ For illustrations, see succeeding paragraphs.

Entering into negotiations without reservation with the agent for settlement on the basis that he is accountable for the price ratifies an unauthorized sale. *Sanders v. Peck*, 30 C. C. A. 530, 87 Fed. 61.

²⁵ *Clarke v. Perrier*, 2 Freem. 48; *Conwal v. Wilson*, 1 Ves. 509; *Cushman v. Loker*, 2 Mass. 106; *Low v. Railroad Co.*, 46 N. H. 284; *Dunn v. Railroad Co.*, 43 Conn. 434; *Codwise v. Hacker*, 1 Calnes (N. Y.) 526; *Palmerton v. Huxford*, 4 Denio (N. Y.) 166; *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 Pa. 398, 22 Atl. 667, 27 Am. St. Rep. 638; *Hauss v. Niblack*, 80 Ind. 407; *Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276; *Reid v. Hibbard*, 6 Wis. 175; *Rich v. Bank*, 7 Neb. 201, 29 Am. Rep. 382; *Snow v. Grace*, 29 Ark. 131; *Waterson v. Rogers*, 21 Kan. 529.

²⁶ *Hunter v. Parker*, 7 M. & W. 322; *Brewer v. Sparrow*, 7 B. & C. 310; *The Bonita v. The Charlotte*, Lush. 252; *Lindroth v. Litchfield* (C. C.) 27 Fed. 894; *Lyman v. University*, 28 Vt. 560; *Tilleny v. Wolverton*, 54 Minn. 75, 55 N. W. 822; *Town of Ansonia v. Cooper*, 64 Conn. 536, 30 Atl. 760; *Deering & Co. v. Bank*, 81 Iowa, 222, 46 N. W. 1117; *Smith v. Barnard*, 148 N. Y. 420, 42 N. E. 1054.

the property,²⁷ is held to ratify the sale or the purchase. So, where the principal knowingly accepts rent under an unauthorized lease,²⁸ or the proceeds of an unauthorized loan,²⁹ or of a compromise,³⁰ or effects a settlement with an agent for embezzlement of the proceeds of an unauthorized sale.³¹ The act must, however, be inconsistent with the existence of an intention not to adopt, and hence conduct which would have been within the principal's right in case he repudiated the transaction will not amount to ratification.³² And if the principal is ignorant of material facts, as where he accepts moneys from an agent without knowledge that they are the

²⁷ *Cornwall v. Wilson*, 1 Ves. 510; *Walham v. Wakefield*, 1 Camp. 120; *Hastings v. Bangor House*, 18 Me. 436; *Moss v. Mining Co.*, 5 Hill, 137; *Ketchum v. Verdell*, 42 Ga. 534; *Jones v. Atkinson*, 68 Ala. 167; *Williams v. Lumber Co.*, 118 N. C. 923, 24 S. E. 800; *McKinstry v. Bank*, 57 Kan. 279, 46 Pac. 302; *Ehrmantraut v. Robinson*, 52 Minn. 333, 54 N. W. 188 (entry and use of land under an unauthorized lease); *Hall v. White*, 123 Pa. 95, 16 Atl. 521 (taking possession of land under unauthorized contract for purchase); *Chambers v. Haney*, 45 La. Ann. 447, 12 South. 621 (selling land received under unauthorized exchange); *Wright v. Vinyard Church*, 72 Minn. 78, 74 N. W. 1015 (retaining and using after notice of repudiation).

²⁸ *Reynolds v. Davison*, 34 Md. 662; *Burkhard v. Mitchell*, 16 Colo. 376, 26 Pac. 657.

²⁹ *Maddux v. Bevan*, 39 Md. 485; *Perkins v. Boothby*, 71 Me. 91; *Taylor v. Ass'n*, 68 Ala. 229; *Willis v. Sanitation Co.*, 53 Minn. 370, 55 N. W. 550.

³⁰ *Strasser v. Conklin*, 54 Wis. 102, 11 N. W. 254; *Keeler v. Salisbury*, 33 N. Y. 648; *Higginbotham v. May*, 90 Va. 233, 17 S. E. 941; *Orvis v. Wells, Fargo & Co.*, 19 C. C. A. 382, 73 Fed. 110 (accepting payment under award or ratification of an unauthorized submission to arbitration); *City of Findlay v. Pertz*, 20 C. C. A. 662, 74 Fed. 681; *National Imp. & Const. Co. v. Malken*, 103 Iowa, 118, 72 N. W. 431.

³¹ *Ogden v. Marchand*, 29 La. Ann. 61. Accepting from the agent security against loss which might result from an unauthorized act was not ratification. *Lazard v. Transportation Co.*, 78 Md. 1, 26 Atl. 897.

³² *White v. Sanders*, 32 Me. 188.

The owner of a building did not become liable for improvements made under an unauthorized contract with his agent, because he aft-

proceeds of an unauthorized sale, intention to ratify cannot be implied.³³

Same—Bringing Suit.

Bringing an action, based upon the unauthorized transaction, whether against the person with whom the agent dealt, or the agent himself, is ordinarily conclusive evidence of ratification.³⁴ Thus, where the principal sues the other party

erwards used them, where they were of such a character that they could not be removed. *Mills v. Berla* (Tex. Civ. App.) 23 S. W. 910.

Where defendant's superintendent, contrary to orders, bought goods, and, colluding with the seller, caused them to be intermingled with other goods from the same seller, some of which had been paid for, and it could not be ascertained whether the goods in question had been paid for, retaining and selling them was not a ratification. *Schutz v. Jordan* (C. C.) 32 Fed. 55.

Retaining a salesman after knowledge of his unauthorized act is not evidence of ratification. *Deacon v. Greenfield*, 141 Pa. 467, 21 Atl. 650.

A mere effort on the part of the principal, after knowledge of the unauthorized act, to avoid loss thereby, will not amount to ratification, so as to relieve the agent from liability. *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; post, p. 87.

³³ *Thacher v. Pray*, 113 Mass. 291, 18 Am. Rep. 490. See, also, *McGlassen v. Tyrrell* (Ariz.) 44 Pac. 1088; *Chicago Edison Co. v. Fay*, 164 Ill. 323, 45 N. E. 534.

Where defendant authorized an agent for a certain sum to obtain a release of plaintiff's interest in land, and the agent agreed as part of the consideration for obtaining it that defendant should assume a debt of plaintiff, and defendant, in ignorance of the unauthorized agreement, sold the land, his failure, after being informed of it, to restore the property, was not a ratification. *Martin v. Hickman*, 64 Ark. 217, 41 S. W. 852.

After commencement of an action of replevin for cattle claimed by defendants under a sale by plaintiff's agent, which plaintiff claimed was unauthorized, but before trial, plaintiff learned that it had received the benefit of a portion of the proceeds of sale. Held, that its failure then to return or tender such portion was a ratification which defeated recovery. *Johnston v. Investment Co.*, 49 Neb. 68, 62 N. W. 383. See, also, *Farmers' & Merchants' Bank v. Bank*, 49 Neb. 379, 68 N. W. 488.

³⁴ *Smith v. Morse*, 9 Wall. (U. S.) 82, 19 L. Ed. 597; *Merrill v. Wil-*

to a contract made in his behalf,⁵⁵ or brings an action to enforce security taken in his name,⁵⁶ or sues the agent for an accounting of the proceeds of an unauthorized transaction,⁵⁷ he thereby elects to take the benefit of the transaction, and adopts it in toto.

Same—Acquiescence—Silence.

While an unauthorized act cannot take effect as the act of the principal unless it be ratified, and hence need not be rescinded, it is evident that his failure to express dissent upon being informed of a transaction may reasonably give ground for inferring assent. If, for example, an agent should make an unauthorized sale of his principal's property, and the principal, after being informed, should remain silent, knowing that the purchaser was dealing with the property as his

son, 66 Mich. 232, 33 N. W. 716; *Connett v. City of Chicago*, 114 Ill. 233, 29 N. E. 280; *Tingley v. Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055 (pleading an unauthorized contract as a defense held a ratification).

In an action for conversion of notes collusively transferred to defendant by plaintiff's agent, it appeared that under the contract of agency all notes were to be taken in plaintiff's name, but that the agent had taken them in his own. Held, that by bringing the suit plaintiff ratified the agent's act, and might recover for the conversion. *Warder, Bushnell & Glessner Co. v. Cuthbert*, 99 Iowa, 681, 68 N. W. 917.

⁵⁵ "When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement. * * * But, knowing the terms of sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract, and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant." *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88, per Loomis, J.; *Benson v. Liggett*, 78 Ind. 452; *Curnane v. Scheidel*, 70 Conn. 13, 38 Atl. 875; *D. M. Osborn Co. v. Jordan*, 52 Neb. 465, 72 N. W. 479; *Edgar v. Joseph Breck & Sons Corp.*, 172 Mass. 581, 52 N. E. 1083.

⁵⁶ *Partridge v. White*, 59 Me. 564.

⁵⁷ *Lyell v. Kennedy*, 14 App. Cas. 437; *Frank v. Jenkins*, 22 Ohio St. 597.

own, the principal's silence would speak his assent as clearly as words.³⁸ And, notwithstanding that the principal may not have knowledge that third persons are acting upon the assumption that the agent's act was authorized, it is evident that he will under most circumstances, as a reasonable man, upon being informed of an assumption of authority, express his dissent if he does not intend to adopt the transaction, and that his mere silence is evidence of ratification. Such evidence is, of course, not so strong in the case of an act done by a mere stranger who has volunteered to act in another's behalf as in the case of an agent who has exceeded his authority.³⁹ Where, however, the relation of principal and agent already exists, the rule is established that failure to repudiate within a reasonable time after being informed of an act done in excess of authority is conclusive evidence of ratification.⁴⁰ What time is reasonable must depend upon the facts of each case, and the particular circumstances tending to excuse or explain the principal's silence or to impose the duty of prompt disavowal, but the circumstances may be such as to require immediate repudiation.⁴¹ The

³⁸ Hall v. Harper, 17 Ill. 82; Swartwout v. Evans, 37 Ill. 442; Alexander v. Jones, 64 Iowa, 207, 19 N. W. 913; Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480, 32 S. E. 591.

³⁹ Post, p. 71.

⁴⁰ Prince v. Clark, 2 D. & R. 266; Law v. Cross, 1 Black (U. S.) 533, 17 L. Ed. 185; Union Gold Min. Co. v. Bank, 96 U. S. 640, 24 L. Ed. 648; Norris v. Cook, 1 Curt. (U. S.) 464, Fed. Cas. No. 10,305; Abbe v. Rood, 6 McLean (U. S.) 106, Fed. Cas. No. 6; Brigham v. Peters, 1 Gray (Mass.) 139; Johnson v. Wingate, 29 Me. 404; Curry v. Hale, 15 W. Va. 875; Bray v. Gunn, 53 Ga. 144; Mobile & M. Ry. Co. v. Jay, 65 Ala. 113; Clay v. Spratt, 7 Bush (Ky.) 334; Booth v. Wiley, 102 Ill. 84; Cooper v. Mulder, 74 Mich. 374, 41 N. W. 1084; Cooper v. Schwartz, 40 Wis. 54; Saveland v. Green, Id. 431; Union Gold Min. Co. v. Bank, 2 Colo. 565; E. Bement & Sons v. Armstrong (Tenn. Ch. App.) 39 S. W. 899; Smith v. Holbrook, 99 Ga. 256, 25 S. E. 627; Hartlove v. William Falt Co., 89 Md. 254, 43 Atl. 62.

⁴¹ The Australia, Swab. 480; Law v. Cross, 1 Black (U. S.) 533, 17 L. Ed. 185; Foster v. Rockwell, 104 Mass. 167; Hazard v. Spears, ⁴³ N. Y. 469; Kelsey v. Bank, 69 Pa. 426.

rule is sometimes placed upon the ground of equitable estoppel,⁴² and clearly the principle of estoppel is applicable where third persons have acted to their prejudice in reliance upon the apparent assent; but the rule is broader than that of equitable estoppel, and rests upon the presumed intention of the principal, irrespective of whether or not the other party has actually been prejudiced or misled by the delay.⁴³

Same—Act Done by Stranger.

When the unauthorized act is not the act of an agent in excess of his authority, but is the act of a stranger, silence on the part of the quasi principal is logically entitled to less weight. "Where an agency actually exists," says Story, "the mere acquiescence of the principal may give rise to the presumption of an intentional ratification of the act. The presumption is far less strong, and the mere fact of acquiescence may be deemed far less cogent, where no relation of agency exists at the time between the parties. However, if there are peculiar relations of a different sort between the parties, such as that of father and son, the presumption of a ratification will become more vehement, and the duty of disavowal on the part of the principal more urgent, when

⁴² *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800. See *Kent v. Mining Co.*, 78 N. Y. 159.

⁴³ Cases cited *supra*, notes 90, 91.

In *Bigg v. Stone*, 3 Sm. & Gif. 592, where a son, who usually acted as agent for his father, without authority sold his interest in land, the court said: "It is clearly established that the father had full notice of the agreement, if not immediately or on the same day, yet certainly within five days after the agreement was signed. It cannot be considered that any express act on his part, such as signature of the agreement by himself or any other solemnity by him after he became privy to the act done by his son on his behalf, was essentially necessary. Subject to his right to a reasonable opportunity to express his dissent, every additional day and hour of silence after he became privy to the contract operates as a tacit acquiescence, and raises the presumption of assent." *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. 329, 70 Am. Dec. 128; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634.

the facts are brought to his knowledge.”⁴⁴ Some courts have, indeed, declared that where no agency exists the quasi principal is under no duty to repudiate, and no inference of ratification is to be drawn from his silence.⁴⁵ This objection, however, should go only to the weight and not to the competency of the evidence, and in such cases, as well as in those where a prior relation has existed, the question is whether, under all the circumstances, the inference of ratification may reasonably be drawn from the principal's silence.⁴⁶ “If those circumstances are such that the inaction

⁴⁴ Story, Ag. § 256.

⁴⁵ Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385.

“Should a stranger, without authority, assume to act as the agent of another, it would be intolerable if such other would be bound to compensate the interloper for his services unless he gave the latter ‘notice of his dissent within a reasonable time thereafter.’ The law imposes no such obligation upon business men in respect to those who, without authority, interfere in their affairs.” Kelly v. Phelps, 57 Wis. 425, 15 N. W. 385, per Lyon, J.; 1 Livermore, Ag. 50.

⁴⁶ Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. 329, 70 Am. Dec. 128; Heyn v. O'Hagen, 60 Mich. 150, 26 N. W. 861; Saveland v. Green, 40 Wis. 431. See, also, Ladd v. Hildebrandt, 27 Wis. 135, 9 Am. Rep. 445; Harrod v. McDaniels, 126 Mass. 413; Myers v. Insurance Co., 32 Hun (N. Y.) 321; Merritt v. Bissell, 155 N. Y. 396, 50 N. E. 280; Dugan v. Lyman (N. J. Sup.) 23 Atl. 657.

“If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it, is to say that there can be no implied ratification of an unauthorized act, or, at least, to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself; and, if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means. * * * The prior relations of the parties lend great importance to the fact of silence, but it is a mistake to make the competency of the fact dependent on those relations. * * * It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may not imply it.” Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. 329, 70 Am. Dec. 128.

or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to, and relying upon, such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency."⁴⁷

Knowledge of Facts.

Since ratification rests upon assent, to be binding it must, as a rule, be made with full knowledge of all the facts necessary to an intelligent exercise of the right of election. "No doctrine is better settled on principle or authority than this, that the ratification of the act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of the material facts. If the material facts are either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud."⁴⁸ Hence, if the principal has ratified upon insufficient knowledge, he may, as a rule, after he is informed of the facts, disaffirm. Knowledge of the facts, however, is sufficient; knowledge of their legal effect is not requisite.⁴⁹

⁴⁷ Heyn v. O'Hagen, 60 Mich. 150, 28 N. W. 861, per Morse, J.

⁴⁸ Owings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246, per Story, J. See, also, Lewis v. Read, 13 M. & W. 834; Freeman v. Rosher, 13 Q. B. 780; The Bonita v. The Charlotte, Lush. 252; Gunn v. Roberts, L. R. 9 C. P. 331; Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. Ed. 606; Bennecke v. Insurance Co., 105 U. S. 355, 26 L. Ed. 990; Bosseau v. O'Brien, 4 Bliss. (U. S.) 395, Fed. Cas. No. 1,667; Combs v. Scott, 12 Allen (Mass.) 493; Seymour v. Wyckoff, 10 N. Y. 213; Baldwin v. Burrows, 47 N. Y. 199; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Bannon v. Warfield, 42 Md. 22; Hardeman v. Ford, 12 Ga. 205; Manning v. Gasparie, 27 Ind. 399; International Bank v. Ferris, 118 Ill. 465, 8 N. E. 825; Ætna Ins. Co. v. Iron Co., 21 Wis. 458; Holm v. Bennett, 43 Neb. 808, 62 N. W. 194; Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388; Miller v. Board, 44 Cal. 166; Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478; Hunt v. Agricultural Works, 69 Minn. 539, 72 N. W. 813.

⁴⁹ Kelley v. H. Railroad Co., 141 Mass. 496, 6 N. E. 745; Hyatt v. Clark, 118 N. Y. 563, 23 N. E. 891; Hillberry v. Hatton, 6 El. & B. 868. But see Dugan v. Lyman (N. J. Sup.) 23 Atl. 657.

Nevertheless, it is within the power of the principal, if he sees fit, to ratify without full knowledge. "The intention to adopt the act at all events is the same as adopting with knowledge." ⁵⁰ If he deliberately ratifies upon such knowledge as he possesses, without caring for more, intentionally assuming the risk of the facts, he has the right to do so, and a ratification made under such circumstances is binding.⁵¹ But, since the principal is under no obligation to ratify an unauthorized act, it is for the person who relies upon a ratification to show that all material facts were made known to the principal, or else that the circumstances were such as to manifest an intention on his part to ratify at all events.⁵² Nor does mere negligence or omission to make inquiries necessarily manifest an intention to ratify, or necessarily preclude the principal from disaffirming upon subsequently learning the facts.⁵³ Yet while failure to make full inquiry does not charge the principal, as matter of law, with knowledge of what an inquiry would have disclosed, it may be

⁵⁰ *Freeman v. Rosher*, 13 Q. B. 780, *Patterson, J.*

⁵¹ *Lewis v. Read*, 13 M. & W. 834; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 48; *Kelley v. Railroad Co.*, 141 Mass. 496, 6 N. E. 745; *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188.

⁵² *Combs v. Scott*, 12 Allen (Mass.) 493; *Wheeler v. Sleigh Co.* (C. C.) 39 Fed. 347; *Moore v. Ensley*, 112 Ala. 228, 20 South. 744.

⁵³ *Combs v. Scott*, 12 Allen (Mass.) 493.

It was held error to charge, on the question of ratification, that if there was a material mistake it made no difference how it arose, or whether the principal might have ascertained the contrary to be true, "unless it arose from the negligence of the principal." *Bigelow, C. J.*, said: "We do not mean to say that a person can be willfully ignorant, or purposely shut his eyes to means of information within his possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent, which was unauthorized, cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by

strong evidence of an intention to adopt at all events.⁵⁴ Thus, where the principal accepts the benefits of an unauthorized contract without any attempt to ascertain its terms, the inference is strong, and may be conclusive, that he intended to take the risk and adopt the contract upon such knowledge as he had.⁵⁵ But if the contract was such as the agent was authorized to make, and the principal had no reason to suppose that the agent had departed from his instructions, the fact that the principal accepted the benefits without inquiry would be no evidence of intention to adopt a

the use of diligence on his part to ascertain them. The mistake at the trial consisted in the assumption that any such diligence was required of the defendants." *Murray v. Lumber Co.*, 143 Mass. 250, 9 N. E. 634.

Ratification of the unauthorized execution of a note does not ratify stipulations therein to pay attorney's fees and waive exemptions, unless with knowledge of such stipulations. *Brown v. Bamberger*, 110 Ala. 342, 20 South. 114.

The principal is not chargeable with information which he means of knowledge disclosed, if not willfully ignorant. *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9, 41 L. R. A. 617, 68 Am. St. Rep. 446. But see *Eadie v. Ashbaugh*, 44 Iowa, 519.

⁵⁴ "With respect to those who do not think proper to seek information, the fact that they did not choose to inquire is strong evidence that they were satisfied to adopt the acts of the directors at all events and under whatever circumstances." *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, Willes, J. See *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 43 Pac. 589.

The principal cannot escape liability by purposely closing his eyes. *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634.

⁵⁵ *Meehan v. Forrester*, 52 N. Y. 277; *The Henrietta* (D. C.) 91 Fed. 675; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563; *State Bank v. Kelly*, 109 Iowa, 544, 80 N. W. 520; *Glor v. Kelly*, 40 App. Div. 617, 63 N. Y. Supp. 339.

Where a principal, knowing that an unauthorized lease had been made in his behalf, entered into possession and enjoyed the use of the premises without knowing or ascertaining the terms of the lease, he must be held to have intended to ratify the lease, whatever it might be. *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188.

contract into which the agent had, without informing his principal, introduced unauthorized terms.**

EFFECT OF RATIFICATION.

18. The effect of ratification is by relation to invest the person on whose behalf the act ratified was done, the person who did the act, and third persons with the same rights and duties as if the act had been done with the previous authority of the person ratifying.

EXCEPTIONS: (1) INTERVENING RIGHTS OF STRANGERS. Where rights of strangers have become vested between the time of performance of the act and its ratification, ratification is not effective to divest such rights.

(2) ACT CREATING RIGHT AGAINST THIRD PERSON.

In some cases, where the act is such that it would if authorized create a right in favor of the principal to have some act performed by a third person, so that in justice he is entitled to know whether the act is authorized before being bound to perform, ratification is not effective to charge such third person by relation with the duty which would have been imposed upon him had the act been authorized.

(3) CONTRACT—OTHER PARTY. Where the act ratified is a contract—

- (a) Some courts hold (it seems erroneously) that ratification is ineffective to bind the other party to performance unless he subsequently assents;**
- (b) Some courts hold (it seems correctly) that ratification is not effective to bind the other party to performance if he has withdrawn his assent before ratification.**

** *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. 323.

Where a principal authorized an agent to sell stock, expressly reserving the right to a dividend, and the agent sold, agreeing that the dividend should go with the stock, and the owner received the exact amount for which he had authorized the stock to be sold, without knowledge of the agreement, retaining the proceeds was not a ratification. *Wheeler v. Sleigh Co.* (C. C.) 39 Fed. 347. See, also, *Long v. Poth*, 16 Misc. Rep. 85, 37 N. Y. Supp. 670.

- (4) LIABILITY OF AGENT.** In some cases ratification is not effective to relieve the agent from liability to the principal for performance of an unauthorized act.

Ratification Irrevocable.

An election to ratify once made is irrevocable.¹ If the principal adopts the act for a moment he is bound.² This statement is, of course, subject to the qualification that the ratification must be made with knowledge of the facts, or else must be made with the intention to ratify whatever the facts may be; for otherwise the principal may disavow the ratification upon being informed of the facts.³

Doctrine of Relation.

By the doctrine of relation, the principal, the agent, and the person with whom the agent dealt are, upon ratification, as a rule, invested with the same rights and duties as if the act ratified had been authorized. "Omnis rati habitio retro trahitur et mandato æquiparatur." Yet while it is the rule that ratification relates back and is equivalent to previous authority, there are many cases in which ratification is in fact far from being equivalent to previous authority, and in which a strict application of the doctrine of relation would lead to absurd and unjust results. To apply the doctrine in such cases would be to adhere to a legal fiction at the expense of facts and plain justice, and the law accordingly recognizes many exceptions to the rule.⁴ These exceptions may properly be dealt with in treating of the effect of ratification, for the question is not what acts are capable of ratification, but, rather, what are the limitations upon the doctrine of relation in its effect upon the rights and duties of the different persons concerned, when ratification actually takes place.⁵

§ 18. ¹ Smith v. Cologan, 2 T. R. 188, note; Jones v. Atkinson, 68 Ala. 167; Brock v. Jones, 16 Tex. 461; Sanders v. Peck, 30 C. C. A. 530, 87 Fed. 61. As to ratification after disapproval, ante, p. 62.

² Smith v. Cologan, 2 Term R. 188, note.

³ Ante, p. 61.

⁴ 9 Harv. Law Rev. 60; 5 Harv. Law Rev. 19.

⁵ Post, p. 77.

Effect of Ratification—Intervening Rights of Strangers.

An obvious limitation upon the doctrine of relation is that it cannot be allowed to defeat rights of strangers which have accrued between the act and the ratification.⁶ Thus the principal cannot, by ratifying an unauthorized contract of sale, defeat an intermediate sale of the property made by himself,⁷ or defeat intervening liens acquired by attachment or judgment upon the property.⁸ So, where an unauthorized notice of stoppage in transitu was given, and afterwards the transitus was terminated by demand for the goods made by the assignees in bankruptcy of the consignee upon and refusal of the carrier to deliver the goods, which the carrier delivered to the consignor's assumed agents, it was held that the consignor's subsequent ratification of what had been done on his behalf was inoperative to defeat the right of property in the goods, which upon termination of the transitus had become vested in the assignees in bankruptcy. "In some cases," said Rolfe, B., "where an act which, if authorized, would amount to a trespass, has been done in the name and on behalf of another, but without

⁶ Lord Audley v. Pollard, Cro. Eliz. 561; Donnelly v. Popham, 1 Taunt. 1; Bird v. Brown, 4 Ex. 786; Lyell v. Kennedy, 18 Q. B. D. 796; Cook v. Tullis, 16 Wall. (U. S.) 332, 21 L. Ed. 933; McCracken v. City of San Francisco, 16 Cal. 624; Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612; Pollock v. Cohen, 32 Ohio St. 514; McMahan v. McMahan, 18 Pa. 376, 53 Am. Dec. 481; Stoddart's Case, 4 Ct. Cl. (U. S.) 511; Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114; Graham v. Williams, 114 Ga. 716, 40 S. E. 790.

⁷ Parmelee v. Simpson, 5 Wall. (U. S.) 81, 18 L. Ed. 542; McCracken v. City of San Francisco, 16 Cal. 624; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421.

⁸ Wood v. McCain, 7 Ala. 806, 42 Am. Dec. 612; Taylor v. Robinson, 14 Cal. 396; Pollock v. Cohen, 32 Ohio St. 514; Norton v. Bank, 102 Ala. 420, 14 South. 872; Simon v. Association, 54 Ark. 58, 14 S. W. 1101.

Where an agent to collect an account takes a deed of land therefor without authority, and after recording, but before ratification, the land is attached by another creditor, his rights are not defeated by the ratification. Kempner v. Rosenthal, 81 Tex. 12, 16 S. W. 639.

previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time, and under circumstances, when the ratifying party might have lawfully done the act which he ratifies. * * * The stoppage could only be made during the transitus. During that period the defendants, without authority from Illins [the consignor], made the stoppage. After the transitus was ended, but not before, Illins ratified what the defendants had done. From that time the stoppage was the act of Illins, but it was then too late for him to stop. The goods had already become the property of the plaintiffs, free from all right of stoppage." *

It does not follow, however, that the ratification, although its effect is thus partially defeated by the intervention of superior rights, is totally inoperative. Thus, in the last case, the stoppage by ratification became the act of the consignor, and he might consequently have been held liable for the conversion. Nor upon principle is there any reason why one who sees fit to ratify an unauthorized contract of sale, although he has in the meantime conveyed the property to a stranger, cannot be held to respond in damages to the other party to the contract, or can avoid the obligation to indemnify and compensate the agent.¹⁰

Same—Between Principal and Third Party.

The transaction ratified may be a mere act or it may be a contract. In both cases the doctrine of relation applies without exception, so far as concerns the binding force of the ratification upon the principal. In its effect upon the obligations of the other party, however, the doctrine of relation is not universally applicable.¹¹

* Bird v. Brown, 4 Ex. 786.

¹⁰ See Lyell v. Kennedy, 14 App. Cas. 437.

¹¹ Story, Ag. § 245.

(a) *Acts Other Than Contracts.* Where an unauthorized act is of such a nature that it would, if authorized, create a right in favor of the principal to have some act performed by a third person, the performance of which, in the absence of authority on the part of the assumed agent, would be unnecessary, it is manifestly unjust to give to ratification the effect of previous authority, so as to subject the third person, if he fails to perform, to the consequences which would have resulted from nonperformance had the act of the assumed agent been authorized;¹² for the third person, being ignorant whether the act will be ratified, is obliged to perform at his own risk, and will be without protection if the principal disavows the act. The courts have frequently recognized an exception to the doctrine of relation in such cases, although the exception is not clearly defined or universally recognized.¹³ Thus, it has been held that an unauthorized

¹² "On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses, for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it, so as to bind the third person to the consequences." Story, Ag. § 246. See 5 Harv. Law Rev. 19; 9 Harv. Law Rev. 60; Wright, Prin. & Ag. 49.

¹³ Mr. Wharton suggests the uncertain test of "moral" certainty. "In all cases in which it is morally sure the principal will ratify, other parties are bound to treat the intervener—the negotiorum gestor—as an agent. In cases where the ratification of the principal may be regarded as doubtful, the intervener may be treated as a mere interloper." Wharton, Ag. § 80. This distinction is approved in *Farmers' Loan & Trust Co. v. Railroad Co.* (C. C.) 83 Fed. 870, in which case the facts were as follows: Under a provision in a railroad mortgage that, on default in payment of any installment of interest, continuing for 60 days, the holders of one-third in amount of the bonds secured might declare the principal due, by an instrument executed by them "or their attorneys in fact thereto duly authorized," and delivered to the trustee, such a declaration of maturity was signed by a person as attorney in fact of his wife and two brothers, who were bondholders. He had no written authority,

notice to quit does not become binding upon a tenant by ratification,¹⁴ at least if he fails to act upon it.¹⁵ "A ratification given afterwards will not do in his case," said Lord Ellenborough in *Right v. Cuthell*,¹⁶ "because the tenant was entitled to such notice as he could act upon with certainty at the time it was given; and he was not bound to submit himself to the hazard whether the third coexecutor chose to ratify the act of his companions or not." And Lawrence, J., said in the same case: "The rule of law, that *omnis ratihabitio retro trahitur*, etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification." So, it seems, an unauthorized demand, though ratified, will not support an action, for the other party has a right to know whether he may safely pay or deliver to the person making demand.¹⁷ On the other hand, it has been held that the bringing of an action may be subsequently ratified

but an instrument ratifying his act was executed by the persons for whom he acted after the filing of a bill of foreclosure by the trustees. Held, that such ratification rendered effective the act of the attorney as against the mortgagor and a second mortgagee. *Lurton, J.*, after referring to Mr. Wharton's distinction, said: "Applying this to the defendants, they must be regarded as bound by the ratification, which in view of the relationship borne by D. Willis James to those he assumed to represent, and the obvious interest they have in ratifying what he did, can be no surprise to them." See *Johnson v. Johnson* (C. C.) 31 Fed. 700, 702.

¹⁴ *Right v. Cuthell*, 5 East, 491; *Doe v. Walters*, 10 B. & C. 626; *Doe v. Goldwin*, 2 Q. B. 143; *Brahn v. Forge Co.*, 38 N. J. Law, 74; *Pickard v. Perley*, 45 N. H. 188, 86 Am. Dec. 153. Contra: *Roe v. Pierce*, 2 Camp. 96; *Goodtitle v. Woodward*, 3 B. & Ald. 689.

¹⁵ In cases which would otherwise fall within this exception, if the third person recognizes the assumed authority, clearly the reason for denying full effect to a subsequent ratification fails.

¹⁶ 5 East, 491.

¹⁷ *Solomons v. Dawes*, 1 Esp. 83; *Coore v. Calloway*, 1 Esp. 115; *Coles v. Bell*, 1 Camp. 478, note; *Story*, Ag. § 247.

But it has been held that bringing suit founded on an unauthorized

by the party on whose behalf it is brought,¹⁸ although some courts, with what appears to be the better reason, have held that the principal cannot, by ratification, take away from the defendant a defense which he had at the commencement of the action.¹⁹

(b) *Contracts.* The effect of ratification of a contract is to invest the principal with all the obligations of an original

demand is a ratification, and that the demand is sufficient unless the authority to make it was brought in question by the party sought to be charged at the time. *Ham v. Boody*, 20 N. H. 411, 51 Am. Dec. 235; *Payne v. Smith*, 12 N. H. 34; *Town of Grafton v. Follansbee*, 16 N. H. 450, 41 Am. Dec. 736. Notice of dishonor of a bill or note by a stranger, though ratified, does not bind a drawer or indorser. *Stewart v. Kennett*, 2 Camp. 177; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173.

¹⁸ *Ancona v. Marks*, 7 H. & N. 686; *Marr v. Plummer*, 3 Greenl. (Me.) 73; *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85. See, also, *Farmers' Loan & Trust Co. v. Railroad Co.* (C. C.) 83 Fed. 870.

Where the holder of a bill indorsed it, and delivered it to a solicitor, who at his request brought suit on it in the name of Ancona, it was held that his ratification after suit begun entitled him to maintain the action. *Ancona v. Marks*, *supra*.

¹⁹ *Wittenbrock v. Bellmer*, 57 Cal. 12; *Dingley v. McDonald*, 124 Cal. 682, 57 Pac. 574.

Where an agent without authority paid plaintiff a debt due him from defendant out of moneys of defendant, but defendant repudiated the payment, and plaintiff sued on the debt, a ratification, after suit brought, could not operate retroactively, so as to defeat the action. *Fiske v. Holmes*, 41 Me. 441.

Code Prac. Ky. § 550, providing that, in the absence of the plaintiff, the affidavit required by the statute for a writ of attachment may be made by his agent or attorney, intends an existing relation at the time the affidavit is filed, and ratification subsequent to issuance of the writ will not sustain it. *Johnson v. Johnson* (C. C.) 81 Fed. 700.

Ratification of unauthorized signing of plaintiff's name to an attachment bond does not relate back so as to sustain the attachment. *Grove v. Harvey*, 12 Rob. (La.) 221. Contra: *Dove v. Martin*, 23 Miss. 588; *Bank of Augusta v. Courey*, 28 Miss. 667; *Mandel v. Peet*, 18 Ark. 236.

party to it.²⁰ The third party may enforce the contract, and has all the incidental rights that he would possess had the person actually dealing with him been the principal himself. If, for example, the agent induced the third party to sell by means of false representations, the seller has the same right to rescind or to affirm, and otherwise to hold the principal answerable for the fraud, that he would have possessed against the principal acting in person.²¹

By a reasonable application of the doctrine of ratification it should follow that, upon the election of the principal to adopt a contract made on his behalf, the third party becomes bound for its performance. The authorities are not agreed, however, upon this proposition, and some cases have held that since mutual assent is essential to a contract it cannot rest with the party ratifying to bind the other party to an executory contract, and that he can be bound only by some act signifying his present consent to be bound.²² "The principal in such case may," said Dixon, C. J., in the leading case maintaining the negative of the proposition,²³ "by his subsequent assent, bind himself; but if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the prin-

²⁰ *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; *Bronson v. Chappell*, 12 Wall. (U. S.) 681, 20 L. Ed. 436; *Starks v. Sikes*, 8 Gray (Mass.) 609, 69 Am. Dec. 270; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Hankins v. Baker*, 46 N. Y. 666; *United States Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337.

²¹ *Elwell v. Chamberlin*, 31 N. Y. 611; *Smith v. Tracy*, 36 N. Y. 79; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; *Lane v. Black*, 21 W. Va. 619; post, pp. 229, 275 et seq.

²² *Dodge v. Hopkins*, 14 Wis. 630; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103. Cf. *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

This doctrine is supported by Mr. Mechem in his work on Agency (section 179), and in 24 Am. Law Rev. 580. It is adversely criticised in *Atlee v. Bartholomew*, 5 Am. St. Rep. 113, note (s. c. 69 Wis. 43, 33 N. W. 110); 25 Am. Law Rev. 74; 9 Harv. Law Rev. 60.

²³ *Dodge v. Hopkins*, 14 Wis. 630.

principal, which, if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory." The fallacy of this reasoning, it is submitted, lies in applying to the anomalous doctrine of ratification the test of mutual assent. Undoubtedly, a contract which requires ratification, like other contracts, must rest on mutual assent. But in the case under consideration the assent of the other party is given in advance. It is true that until ratification the contract is not binding because of the absence of assent on the part of the assumed principal, but by ratifying the contract he assents to it, and the assent then becomes mutual and the contract by relation mutually binding as of the date it was entered into by the assumed agent.²⁴

²⁴ *McClintock v. Oil Co.*, 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785; post, p. 85.

In *Hagedorn v. Oliverson*, 13 East, 274, where plaintiff, without authority, procured an insurance upon a ship for the benefit of the owner, who ratified after a loss had occurred and was known, it was held that an action was maintainable on the policy for his benefit. See, also, *Routh v. Thompson*, 13 East, 274; *Finney v. Insurance Co.*, 5 Metc. (Mass.) 192, 38 Am. Dec. 397; *Stillwell v. Staples*, 19 N. Y. 401; *Williams v. North China Ins. Co.*, 1 C. P. D. 757.

These cases are exceptional, in that they give full effect to the ratification notwithstanding that the principal would not then be able to make the same contract as that ratified. In *Williams v. North China Ins. Co.*, supra, the rule which they establish with regard to marine insurance was sustained by Cockburn, C. J., both on the ground of stare decisis, and as a legitimate exception from the general rule, because "where an agent effects an insurance subject to ratification the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract." See, also, Story, Ag. § 248; Wharton, Ag. § 81.

But where a life insurance policy expressly provided that it should not take effect until the advance premium should have been paid during the lifetime of the insured, it was held that an unauthorized payment of the premium during his life could not be ratified by his administrator. *Whiting v. Insurance Co.*, 129 Mass. 240, 37 Am. Rep. 317. Cf. *Dibbins v. Dibbins* [1896] 2 Ch. 348.

Same—Withdrawal of Other Party before Ratification.

A question closely connected with that discussed in the last paragraph is whether the other party to an unauthorized contract may withdraw from it before ratification. In jurisdictions where it is held that the assent of the other party to be bound by the contract, even after ratification, is requisite, the question is, of course, answered in the affirmative.²⁵ In England, on the other hand, the doctrine of relation has recently been pushed to an extreme limit, and it has been held that ratification by the assumed principal is effective to bind the other party to the contract notwithstanding that he has in the meantime withdrawn his assent. Thus, where an offer was accepted without authority by the managing director of a company on its behalf, and before ratification the other party gave notice that he withdrew his offer, it was held that the subsequent ratification related back to the time of acceptance, and rendered the withdrawal inoperative. Lindley, C. J., said: "I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn. The true view, on the contrary, appears to be that the doctrine as to the retrospective action of ratification is applicable. If we look to Mr. Brice's argument closely, it will be found to turn on this—that the acceptance was a nullity, and, unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. Brice's contention cannot be accepted. * * * I see no reason to take this case out of the application of the general principle as to ratification."²⁶ The effect of this decision is that between the time of the unauthorized con-

²⁵ Ante, p. 82.

²⁶ *Bolton Partners v. Lambert* [1889] 41 Ch. D. 295. This case has been adversely criticised. See Wright, Prin. & Ag. 51; Bowstead, Ag. 41; Campbell, Sale of Goods & Com. Ag. 238; Foy, Spec. Perf. (3d Ed.) 711; Huffcut, Ag. § 38; 5 Law Q. Rev. 440; 9 Harv. Law Rev. 60.

But it was followed in *Re Portuguese Consolidated Copper Mines*,

tract and its ratification the other party is contingently bound, although the principal is not bound.²⁷ It seems possible, however, to give effect to the principle as to ratification without doing violence to the principle requiring contracts to be based on mutual assent, by holding that the ratification is not effective to make the contract binding upon the other party if he has in the meantime withdrawn his assent,²⁸ but that unless it be withdrawn, being an assent to what purports to be a contract and not in form a mere offer, the assent continues, the contract thus becoming binding upon ratification by mutual assent.²⁹

45 Ch. D. 16, and in *Re Tiedemann & Ledermann Frere* [1899] 2 Q. B. 66. See, also, *Andrews v. Insurance Co.*, 92 N. Y. 596, 604.

But acceptance by an agent, acting without authority, of an option of purchase, which has to be exercised within a limited time, is not made effective by ratification after the time has expired. *Dibbins v. Dibbins* [1896] 2 Ch. 348.

²⁷ "It comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the meantime will bind the purchaser to his principal, but it will not in any way bind the principal to the purchaser." In *re Portuguese Consolidated Copper Mines*, 45 Ch. Div. 16, per North, J.

²⁸ This view finds support, even in England, in the earlier case of *Walter v. James*, L. R. 6 Ex. 124 [1891]. In that case an agent, after revocation of his authority, paid money on behalf of his principal to a creditor, who afterwards returned it to the agent at his request. In an action by the creditor against the principal to recover his debt the defendant pleaded payment, but it was held that it was competent for the assumed agent and the third party to cancel the transaction, and that consequently the ratification by plea of payment was too late. But if the third party may withdraw his assent before ratification, with consent of the agent, who obviously has no power to cancel the transaction, it follows that he may withdraw his assent by communicating his withdrawal to the principal, irrespective of the agent's consent.

²⁹ A person having entered into a contract with plaintiff, a married woman, to sell land to her, her husband, assuming to act as her agent, sold the contract to defendant, indorsing thereon at his

Same—Between Principal and Agent.

By the doctrine of relation, ratification invests both principal and agent, as a rule, with the same rights and duties as if the transaction had been previously authorized. If the principal elects to ratify, he assumes the burdens that are incidental to adoption of the agent's act. Hence the agent may look to the principal for compensation³⁰ and indemnity.³¹ And by the ratification the principal ordinarily ab-

request a memorandum of the terms of sale. On the day for payment defendant indorsed on the contract an assignment by husband and wife, which they executed, but defendant refused to accept the assignment. In an action to recover the price, it was held that signing the assignment was a ratification by plaintiff, and that it became binding without acceptance by defendant. Mitchell, J., said: "The objection of want of mutuality is not good in many cases of dealing with an agent, for if he exceeds his authority, actual and apparent, his principal will not be bound, yet may ratify, and then the other party will be bound from the inception of the agreement. The aggregatio mentium of the parties need not commence simultaneously. It must coexist, but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be long or short. The offer, of course, may be revoked or withdrawn at any time prior to acceptance, but after acceptance it is too late." *McClintock v. Oil Co.*, 146 Pa. 144, 28 Atl. 211, 28 Am. St. Rep. 783.

For an able discussion of this vexed question, see "A Problem as to Ratification," by Prof. Wambaugh, 9 Harv. Law Rev. 60.

³⁰ *Wilson v. Dame*, 58 N. H. 392; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *United States Mortg. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

Where the managing owner of a ship sold her through his agent, and his co-owners ratified the sale, they were jointly liable to the agent for his commission. *Keay v. Fenwick*, 1 C. P. D. 745.

Where a real estate agent departs from his authority in effecting a sale, upon ratification the compensation fixed in the original contract of employment controls. *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683.

³¹ *Cornwall v. Wilson*, 1 Ves. 510.

Where an agent defended an action brought against him for breach of a contract entered into by him on behalf of his principal, who ratified what had been done, it was held that he must indemnify the

solves the agent from all responsibility on account of the unauthorized transaction, whether he was an agent who exceeded or departed from his instructions or a mere volunteer.³³ The ratification must, of course, be made with knowledge of the material facts; for otherwise it will not be binding,³⁴ whether the want of knowledge arose from concealment or misrepresentation of the agent or from his mere innocent inadvertence.³⁵ It has been held, however, that an adoption of an agent's unauthorized act in order to make the loss as small as possible is not such a ratification as will relieve the agent;³⁶ in other words, that in such a case the law will not apply the doctrine of relation for the benefit of an agent who has placed the principal in a position where he is forced to ratify to reduce his loss. And where an agent for collection, who was instructed to remit by express, purchased a check drawn on parties in good standing in New York, and forwarded it to his principal, who sent it to New York for collection, but before it was presented the drawers became insolvent, and the check was dishonored, it was held that sending the check for collection was not such a ratification as to absolve the agent for violating his instructions.³⁷ And if the principal delays action after knowledge of the agent against the damages and costs recovered against him in the action. *Frixione v. Tagliaferro*, 10 Moore, P. C. 175.

³³ *Smith v. Cologan*, 2 T. R. 188, note; *Ætna Ins. Co. v. Sabine*, 6 McLean (U. S.) 393, Fed. Cas. No. 97; *Pickett v. Pearsons*, 17 Vt. 470; *Hazard v. Spears*, *43 N. Y. 485; *Hanks v. Drake*, 49 Barb. (N. Y.) 186; *Green v. Clark*, 5 Denio (N. Y.) 497, 502; *Bray v. Gunn*, 53 Ga. 144; *Ward v. Warfield*, 3 La. Ann. 468; *Clay v. Spratt*, 7 Bush (Ky.) 334; *Woodward v. Suydam*, 11 Ohio, 360; *Menkens v. Watson*, 27 Mo. 163.

³⁴ Ante, p. 72. See, also, cases cited in last note.

³⁵ *Bank of Owensboro v. Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Story*, Ag. § 243.

³⁶ *Triggs v. Jones*, 46 Minn. 277, 284, 48 N. W. 1113. See, also, *Walker v. Walker*, 5 Helsk. (Tenn.) 425; *Wharton*, Ag. § 67; *Mechem*, Ag. 173.

³⁷ *Walker v. Walker*, 5 Helsk. (Tenn.) 425.

facts at the request of the agent, so that his conduct is an implied ratification, the agent is not necessarily absolved from liability for his breach of duty.³⁷

Same—Between Agent and Third Party.

One who contracts as agent of another is deemed to warrant his authority. If the contract be authorized, the principal, and not the agent, is liable; but, if it turns out that the agent acted without authority, he must respond to the other party in damages.³⁸ Ratification, being equivalent to previous authority, relieves the agent from all liability to the other party upon an unauthorized contract.³⁹ If the un-

³⁷ In *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113, plaintiff entrusted to an agent a deed with instructions to deliver it to C. upon formation of a contemplated corporation and delivery to plaintiff of stock therein. The agent delivered the deed without fulfillment of the conditions, and C. conveyed to an innocent purchaser. The agent informed plaintiff of the delivery, and plaintiff did not at once repudiate, but joined in taking steps to form the corporation, which was finally abandoned. In an action to obtain a reconveyance and to recover damages against the agent, it was held that because of the delay in repudiating plaintiff was not entitled to a reconveyance, but that his conduct did not amount to such a ratification as to absolve the agent from liability for breach of instructions. Mitchell, J., said: "Mere passive inaction or silence, which would amount to an implied ratification in favor of third parties, might not amount to that in favor of the agent, so as to absolve him from liability to his principal for loss or damage resulting from the unauthorized act, especially if such inaction or failure to immediately disaffirm was induced by the assurances or persuasion of the agent himself. Nor in this case does the affirmative action of the plaintiff, after knowledge of the delivery of the deed, in taking part in the preliminary steps for the organization of the contemplated stock company, of itself amount to a ratification of the unauthorized act. * * * Induced, as such action probably was, by the assurances of Jones that the enterprise would still go on, and plaintiff get his stock, it really amounted to nothing more than an effort on plaintiff's part, after knowledge of Jones' deviation from his instructions, to avoid loss thereby, which is not such a ratification as will relieve the agent."

³⁸ Post, p. 368.

³⁹ *Spittle v. Lavender*, 2 Brod. & B. 452; *Sheffield v. LaDue*, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145; *Berger's Appeal*, 96 Pa. 443.

authorized act is a tort, ratification is of course powerless to relieve the assumed agent from responsibility,⁴⁰ unless the act was one which the principal might lawfully have done, in which case the ratification operates as a justification.⁴¹

⁴⁰ *Hillberry v. Hatton*, 2 H. & C. 822; *Richardson v. Kimball*, 28 Me. 463; *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177.

⁴¹ *Whitehead v. Taylor*, 10 A. & E. 210; *Hull v. Pigerskill*, 1 Brod. & B. 282.

CHAPTER IV.

WHAT ACTS CAN BE DONE BY AGENT—ILLEGALITY—CAPACITY OF PARTIES—JOINT PRINCIPALS AND AGENTS.

19. What Acts can be Done by Agent.
20. Illegality of Object.
21. Capacity of Parties—Principal.
22. Capacity of Parties—Agent—Capacity to Act.
23. Capacity to Enter into Contract of Agency.
24. Joint Principals.
25. Joint Agents.

WHAT ACTS CAN BE DONE BY AGENT.

19. Whatever a person can do in his own right, except an act required by statute to be done in person, he can do by an agent.

ILLEGALITY OF OBJECT.

20. A contract of agency which contemplates an illegal object is void.

What Acts can be Done by Agent.

At common law, as a rule, whatever a person has power to do in his own right he can do by an agent, with the same force and effect as if he had done it in person.¹ A few acts of a personal nature, it is said, cannot be delegated. Thus a man could not do homage or fealty by attorney.² So the exercise of a power, conferred as a personal trust or confidence, may not be delegated;³ but this is not properly an exception to the rule, since the exercise of such a power is not something which the possessor may do in

§§ 19–20. ¹ Combes' Case, 9 Co. 75a.

² Combes' Case, 9 Coke, 75a.

³ Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; post, p. 116.

his own right. Whether an act authorized or required by statute may be done by an agent depends upon the construction of the particular statute, in view of the language used and the nature of the act. Thus, where a law for the licensing of vessels required an oath of ownership by the owner, an oath by the master, acting as agent, was held to be insufficient.⁴ And under Lord Tenterden's act, requiring an acknowledgment or promise, in order to take a debt out of the statute of limitations, to be "signed by the party chargeable thereby," it was held that the signature must be personal, on the ground that the enactment was one of a series of enactments which made a distinction between a signature by the party and a signature by agent.⁵ But, in cases of signatures required by statute, it is generally held that the common-law rule, *qui facit per alium facit per se*, will prevail in determining the construction, if there is nothing in the statute to indicate a different intention.⁶

It follows that, subject to the exceptions mentioned, an agency can be created for any lawful purpose. It does not follow, of course, as has already been pointed out,⁷ that a person can escape from the consequences of an act which he commands or authorizes because it is unlawful, for a man is responsible for torts and crimes whether he acts in his own person or by the instrumentality of another person.

Illegality of Object.

Certain classes of agreements, either because of the illegality of the object, or because certain requirements of the law have not been complied with, or for other reasons, are prohibited, and if for any reason an agreement falls with-

⁴ *United States v. Bartlett, Dav.* (U. S.) 9, Fed. Cas. No. 14,532.

⁵ *Hyde v. Johnson*, 2 Bing. (N. C.) 776; *Swift v. Jewsbury*, L. R. 9 Q. B. 301.

⁶ *In re Whiteley Partners, Limited*, 32 Ch. D. 337; *Finnegan v. Lucy*, 157 Mass. 439, 32 N. E. 856. See, also, *Reg. v. Justices of Kent*, L. R. 8 Q. B. 305.

⁷ *Post*, p. 263.

in a prohibited class it is void. Any such agreement, since it would be inoperative and void if entered into by the principal in person, is, of course, void if entered into by medium of an agent. The power of an agent cannot rise higher than its source.

The effect of illegality upon the contract of agency is the same. If the agreement between principal and agent falls within a class of agreements which the law prohibits, either because of the illegality of the object contemplated, or because of failure to comply with some legal requirement, or for any other reason, the agreement is a nullity, and neither party acquires any of the rights incident to the formation of the relation of principal and agent. The principles which determine the illegality of contracts of agency are the same as those which apply to other contracts, and do not call for separate treatment.⁸ A few examples will serve for illustration.

The most obvious example of an illegal agency is an employment to commit a crime. "If one binds himself in an obligation to kill a man, burn a house, maintain a suit, or the like, it is void."⁹ Even an agreement to commit a civil wrong, though the wrong may not be indictable, is illegal, within the meaning of the term here involved.¹⁰ Among the agencies prohibited by public policy may be named those whose object is to procure administrative action by corrupt means, as by such means to procure government contracts,¹¹

⁸ Anson, Contr. c. 5; Pollock, Contr. c. 6; Clark, Contr. c. 8 (containing a full citation of cases).

⁹ Shep. Touch. 370. See, also, *Shackell v. Rosler*, 2 Bing (N. C.) 638; *Toplett v. Stockdale*, 1 Ry. & M. 337; *Gale v. Leckie*, 2 Stark. 107; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260; *Arnold v. Clifford*, 2 Sumn. (U. S.) 238, Fed. Cas. No. 555; *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087.

¹⁰ Clark, Contr. 378.

¹¹ *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Elkhart County Lodge v. Cray*, 98 Ind. 238, 49 Am. Rep. 746.

or pardons;¹² to procure appointment to office;¹³ to influence by corrupt means the action of legislatures, or lobbying contracts;¹⁴ to impair the integrity of elections;¹⁵ to obstruct the course of justice, as by suppressing evidence or obtaining false testimony;¹⁶ to corrupt agents;¹⁷ to influence the action of another by underhand means;¹⁸ to procure a marriage for compensation;¹⁹ to deal in futures;²⁰ and, in general, to do any act which is contrary to decency and morality. The subject of illegality will be referred to again in connection with the mutual rights and duties of principal and agent.²¹

¹² *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 31 Am. Dec. 750; *Kribben v. Haycraft*, 26 Mo. 396. Such agreements are not illegal where no corrupt means are to be used. *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060.

¹³ *Meguire v. Corwine*, 101 U. S. 108, 25 L. Ed. 899; *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Gray v. Hook*, 4 N. Y. 449; *Clark, Contr.* 416. Such agreements are illegal because of their tendency to introduce corrupt methods. *Providence Tool Co. v. Norris*, *supra*.

¹⁴ *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. Ed. 623; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Brown v. Brown*, 84 Barb. (N. Y.) 533.

¹⁵ *Nichols v. Mudgett*, 32 Vt. 546.

¹⁶ *Gillet v. Logan County*, 67 Ill. 256; *Patterson v. Donner*, 48 Cal. 369.

¹⁷ *Harrington v. Dock Co.*, 3 Q. B. D. 548; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385.

¹⁸ *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442.

¹⁹ *Crawford v. Russell*, 62 Barb. (N. Y.) 92; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343; *Johnson v. Hunt*, 81 Ky. 321.

²⁰ *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862.

²¹ *Post*, pp. 404, 459.

CAPACITY OF PARTIES—PRINCIPAL.

21. Capacity to enter into a contract of agency or to act by means of an agent is coextensive with the capacity of the principal to contract.

EXCEPTION: The appointment of an agent by an infant or lunatic [by power of attorney under seal]¹ is void.

There are certain persons whom the law declares incapable, wholly or in part, of entering into contracts, and their incapacity of course debars them equally from entering into contracts of agency or contracting by means of agents. As a rule, capacity to enter into a contract of agency, or to act or contract by an agent, is coextensive with capacity to contract. In the case of infants and persons non compos mentis, however, there are exceptions.

Infants.

It is a general rule of common law, as established by modern decisions, that the contracts of an infant are not void, but are voidable, at his option, either before or after he has attained his majority.² We should naturally expect this rule to prevail in respect to the contracts entered into by an infant through an agent. Nevertheless it is generally laid down broadly by the cases that an infant cannot appoint an agent or attorney, and that any such appointment, and consequently all acts and contracts of the agent under such appointment, are absolutely void.³ Yet from early times a

§ 21. ¹ The tendency of the cases is to confine the exception to appointment by power under seal, though it is frequently declared that every appointment is void. Upon principle, the appointment of an agent by an infant or lunatic, like the contract of such person, is voidable, and not void.

² Anson, Contr. 105 et seq.; Pollock, Contr. 50 et seq.; Clark, Contr. 221 et seq.

³ *Saunderson v. Man*, 1 H. Bl. 75; *Doe v. Roberts*, 16 M. & W. 778; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Bool v. Mix*, 17 Wend. (N. Y.) 120, 31 Am. Dec. 285; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Knox v. Flack*, 22 Pa. 337; *Waples v. Hastings*,

distinction was drawn between an appointment of an attorney to do an act which is to the infant's advantage and an appointment to do an act which is to his detriment, the one being declared valid and the other void.⁴ "The distinction between deeds of *femes covert* and infants," said Lord Mansfield, "is important: the first are void; the second voidable. * * * Powers of attorney are an exception to the general rule as to deeds; and a power to receive seisin is an exception to that. The end of the privilege is to protect infants. To that object, therefore, all the rules and their exceptions must be directed."⁵ A somewhat similar distinction was formerly made between the contracts of an infant that were manifestly to his prejudice, which were void, and those that were not manifestly so, which were voidable; but the later decisions have generally repudiated

8 Har. (Del.) 408; *Wainwright v. Wilkinson*, 62 Md. 148; *Philpot v. Bingham*, 55 Ala. 439; *Pyle v. Cravens*, 4 Litt. (Ky.) 17; *Lawrence v. McArter*, 10 Ohio, 37; *Armitage v. Widoe*, 36 Mich. 124; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Holden v. Curry*, 85 Wis. 504, 55 N. W. 965; *Wambole v. Foote*, 2 Dak. 1, 2 N. W. 239. See, also, *Bartholomew v. Dighton*, Cro. Eliz. 424; *Whittingham's Case*, 8 Co. 42b; *Dexter v. Hall*, 15 Wall. (U. S.) 9, 25, 21 L. Ed. 73; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 68, 9 L. Ed. 345; *Flexner v. Dickerson*, 72 Ala. 318; *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148, 155.

⁴ *Botteler v. Newport*, Y. B. 21 Hen. VI, 31; *Rames v. Machin*, Noy, 130; *Story*, Ag. § 6.

⁵ *Zouch v. Parsons*, 3 Burr. 1794, 1805, 1808.

"All such gifts, grants, or deeds made by an infant as do not take effect by delivery of his hand are void. But all gifts, grants, or deeds made by an infant by matter in deed, or in writing, which take effect by delivery of his own hand, are voidable by himself and his heirs, and by those who have his estate." Perkins, Prof. Bk. § 12. Referring to this statement of the law, Lord Mansfield observed: "The words 'which do take effect' are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a mere power and convey no interest." *Zouch v. Parsons*, *supra*. See *Wambaugh*, Cas. Ag. 18, note 1.

A power, coupled with an interest, held voidable, and not void. *Duval v. Graves*, 7 Bush (Ky.) 461.

this distinction, holding that the infant is amply secured by refusal to allow the contract to be enforced against him during his infancy and by leaving it to his option to ratify or repudiate it after his majority.⁶ It is noticeable that nearly all the cases cited in support of the exception to the general rule which declares the contracts of an infant to be voidable are cases involving the effect of powers of attorney or warrants of attorney to confess judgment,⁷ and, while as to these the doctrine is perhaps too firmly established by precedent to be departed from, the tendency of the later decisions is to confine the exception, which has frequently been pronounced to be without reason, to such cases.⁸ Thus it has been held that an infant may authorize another to indorse a note, and that the indorsement, being voidable,

⁶ Pollock, Contr. 51.

⁷ *Coursolle v. Weyerhauser*, 69 Minn. 328, 333, 72 N. W. 697; *Huffcut*, Ag. § 15.

⁸ *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 502; *Moley v. Brine*, 120 Mass. 324; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 590, 1 Am. St. Rep. 440, per Holmes, J.; *Hardy v. Waters*, 38 Me. 450; *Towle v. Dresser*, 73 Me. 252; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178; *Hastings v. Dollarhide*, 24 Cal. 195; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697.

Cf. *Ewell's Evans*, Ag. 10, note 1; *Ewell's Lead. Cas. on Disabilities*, 44; 18 Am. Law Rev. 287, 288; *Bishop*, Contr. § 930; *Mechem*, Ag. § 55.

The following considerations have been suggested as the foundation of the exception: "This rule depends upon reasoning, which, if somewhat refined, is yet perhaps well founded. The constituting of an attorney by one whose acts are in their nature voidable is repugnant and impossible, for it is imparting a right which the principal does not possess—that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly—binding acts. The fundamental principle of law in regard to infants requires that the infant should have the power of affirming such acts done by the attorney as he chooses, and avoiding others, at his option; but this involves

may be ratified as if made by the infant in person.⁹ Indeed, it has been held in a recent case in Minnesota that the appointment of an attorney to sell and convey real estate, and a conveyance by the attorney under such appointment, are not void, but are merely voidable, and capable of ratification by the infant on reaching majority. "On principle," said Mitchell, J., "we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. * * * The courts have from time to time made so many exceptions to the exception itself that there seems to be little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in courts."¹⁰

As has already been pointed out, whether an act performed without authority on behalf of an infant is capable of ratifi-

an immediate contradiction, for to possess the right of availing himself of any of the acts he must ratify the power of attorney, and if he ratifies the power all that was done under it must be confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation; and the rule that an infant cannot make an attorney is, perhaps, not an arbitrary or accidental exception to a principle, but a direct, necessary, logical necessity of that principle." 1 Am. Lead. Cas. (5th Ed.) 247. It would seem, however, that an infant might ratify a distinct act done under the power without ratifying the power, and without ratifying other acts done under it.

⁹ Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Hardy v. Waters, 38 Me. 450.

¹⁰ Coursolle v. Weyerhauser, 69 Minn. 328, 72 N. W. 697. In this case the power of attorney was not required to be under seal, the deed being operative as a contract to sell.

cation depends upon whether his appointment to do the act would be held voidable or void.¹¹

Lunatics and Drunken Men.

The modern rule of the common law is that the contract of a lunatic or other person non compos mentis, like that of an infant, is not void, but is voidable, at his option. It may be ratified or disaffirmed by the lunatic on recovery of his sanity, or by his guardian or other representative. The principal difference between the contract of a lunatic and that of an infant is that if the other party did not know, or have reasonable cause to know, of the lunatic's condition of mind, and acted in good faith, and the contract has been so far executed that the parties cannot be placed in statu quo, it cannot be avoided.¹² The leading case on this point is *Molton v. Camroux*,¹³ the principle of which has generally, though not universally, been followed in this country.¹⁴ This has been called a decision of necessity, as a contrary doctrine would render unsafe all ordinary dealings between man and man.¹⁵ If, however, the lunatic restores, or offers to restore, the consideration which he has received, the necessity ceases, and he may avoid the contract.¹⁶ It has been held by some courts that the deed of an insane person is absolutely void, but in most jurisdictions no distinction in this respect is made between a deed and a simple contract, and his deed is held to be voidable, and not void.¹⁷ The contractual capacity of a lunatic or insane person under guardianship depends upon statute, and differs in different states.

¹¹ Ante, p. 59.

¹² Anson, Contr. 115 et seq.; Pollock, Contr. 98 et seq.; Clark, Contr. 263 et seq.; Tiffany, Sales, 12 et seq.

¹³ 2 Ex. 487; 4 Ex. 17; Ewell, Lead. Cas. 614.

¹⁴ For citation of cases, see Tiffany, Sales, 13, note 46.

¹⁵ *Elliot v. Ince*, 7 De G., M. & G. 475, per Lord Cranworth.

¹⁶ *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602; *Warfield v. Warfield*, 76 Iowa, 633, 41 N. W. 383; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716.

¹⁷ Clark, Contr. 268, and cases cited.

In most jurisdictions contracts of a person who has been judicially declared insane and placed under guardianship are void.¹⁸

Upon principle, we should naturally expect the general rule that the contract of a person non compos mentis is voidable, and not void, to apply to the contract of agency, and also to a contract entered into by an agent on behalf of an insane principal; nevertheless it has generally been declared that an insane person cannot appoint an agent,¹⁹ and it has been held by the Supreme Court of the United States that a power of attorney executed by a lunatic is absolutely void.²⁰ It is to be observed, however, that the rule which declares the contracts of insane persons voidable and not void is of comparatively recent origin, and its application to agency has as yet received little attention. In one case, at least, the rule, or rather the exception, that the appointment of an agent by an insane person is void, if, indeed, such rule or exception exists, has been relaxed.²¹

¹⁸ Clark, Contr. 268.

¹⁹ Stead v. Thompson, 3 B. & Ad. 357, note (a); Tarbuck v. Bisham, 2 M. & W. 2; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73; Snyder v. Sponable, 1 Hill (N. Y.) 567; Marvin v. Ingalls, 39 How. Prac. (N. Y.) 329; Lee v. Morris, 3 Bush (Ky.) 210; Story, Ag. § 6. See, also, Elias v. Association, 46 S. C. 188, 24 S. E. 102.

A husband is liable quasi ex contractu for necessities supplied to his wife during his insanity. Read v. Legard, 6 Ex. 636; ante, p. 40.

²⁰ Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73. Much of the reasoning in this case goes to prove that the contract of a lunatic is void. See, also, McClun v. McClun, 176 Ill. 376, 52 N. E. 928.

²¹ Drew v. Nunn, L. R. 4 Q. B. D. 661. See, also, Davis v. Lane, 10 N. H. 156; Matthiessen & Welchers Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Hill v. Day, 34 N. J. Eq. 150; Merritt v. Merritt, 43 App. Div. 68, 59 N. Y. Supp. 357; Bunce v. Gallagher, 5 Blatchf. (U. S.) 481, 489, Fed. Cas. No. 2,133.

Where a husband held out his wife as authorized to pledge his credit, and a tradesman on the faith thereof supplied goods upon her order, the husband was liable for the price of the goods, notwithstanding his intervening insanity, of which the wife, but not the tradesman, had knowledge. Drew v. Nunn, supra.

While it is a rule that insanity of the principal terminates the authority of the agent,²² it has been held that a principal who has become insane after holding out another as agent is nevertheless bound by an executed contract which a third person, in ignorance of the insanity and in reliance upon the holding out, has entered into with the agent, although the insanity was known to the agent. This was in *Drew v. Nunn*,²³ which was placed upon the ground that the holding out is a representation upon which the third person has a right to act until he receives notice that it is withdrawn. "The defendant became insane," said Brett, L. J.,²⁴ "and was unable to withdraw the authority, * * * and where one of two persons, both innocent, must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss." Perhaps no better ground can be assigned than that suggested in explanation of *Molton v. Camroux*, that it is a decision of necessity, as a contrary doctrine would render or-

²² Post, p. 146.

²³ 4 Q. B. Div. 661.

²⁴ *Drew v. Nunn*, 4 Q. B. Div. 661. He also observes: "It is difficult to assign the ground upon which this doctrine, which, however, seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon contract. I have difficulty in assenting to this. * * * I cannot see that an estoppel is created."

"The act of the agent in execution of the power, however, will not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority by a written letter of attorney or by previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transaction may be valid and binding upon the principal. Such cases form an exception to the rule, and the principal, and those claiming under him, may be precluded from setting up his insanity as a revocation, because he has given the agent power to hold himself out as having authority, and because the other party has acted in good faith and in ignorance of any termination of it." *Davis v. Lane*, 10 N. H. 156, per Parker, C. J.

dinary dealings between man and man unsafe. From the decision in *Drew v. Nunn* it would be but a short step to the doctrine that the appointment of an agent by an insane principal is voidable, and not void. And, although the insanity had existed at the time of the agent's appointment, if neither the agent nor the third person were aware of it, when they contracted, it would seem that the doctrine of *Molton v. Camroux* might well apply, and that the principal should be liable upon the contract if it was executed, and the other party could not be placed in statu quo.²⁵

The rules in regard to the contracts of a man who is so intoxicated as not to know what he is doing are the same as those applicable to insane persons. His contracts are voidable, but not void, and hence may be ratified by him when sober.²⁶ Upon principle, it would seem that the appointment of an agent by a drunken man is voidable, and not void.

Whether an unauthorized act done on behalf of a person non compos mentis may be ratified by him after recovery from his disability must depend upon whether the appointment of an agent by such person is to be deemed voidable or void.²⁷

Married Women.

At common law a married woman is, as a rule, incapable of binding herself by a contract, and her contract is void. Incompetent to act herself, she cannot act through the medium of an agent, and her appointment of an agent is void.²⁸

²⁵ See *Evans*, Ag. § 10; *Mechem*, Ag. § 48; *Huffcut*, Ag. § 16.

If the agent was aware of the insanity, although the third person was not, there would perhaps be less reason for holding the principal liable. In such case, it seems, the agent would be liable to the third person upon his so-called warranty of authority. *Drew v. Nunn*, 4 Q. B. Div. 661, per Brett, L. J. Post, p. 146.

²⁶ *Pollock*, Contr. 98 et seq.; *Clark*, Contr. 274.

²⁷ Ante, p. 58.

²⁸ *Oulds v. Sansom*, 3 Taunt. 261; *Fairthorne v. Blaquire*, 6 M. & S. 73; *Brittin v. Wilder*, 6 Hill (N. Y.) 242; *Dorrance v. Scott*, 3

In most jurisdictions, however, the common-law disabilities of married women have been partly or wholly removed, with the result that to the extent to which they may act or contract in person they may generally act or contract by agent, and are bound by the acts of their agents within the limits of the authority conferred.²⁹ Conversely, the removal of the disabilities of married women has imposed upon them corresponding liabilities, among them the liability of a principal, when they have held out another as agent.³⁰ Ordinarily a married woman may appoint her husband an agent,³¹ although under some statutes this power is denied her.³²

It must always be borne in mind that the capacities of married women are created by statute, and that their acts performed by means of agents are binding upon them only within the limits of the capacity so created.³³ "The disabilities of a married woman are general, and exist at common law. The capabilities are created by statute. * * * It is for him who asserts the validity of a contract of a feme covert by evidence to bring it within the exceptions."³⁴ And

Whart. (Pa.) 309, 31 Am. Dec. 509; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592; *Henchman v. Roberts*, 2 Har. (Del.) 74.

²⁹ *Weisbrod v. Railway Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Lavassar v. Washburne*, 50 Wis. 200, 6 N. W. 516; *Knapp v. Smith*, 27 N. Y. 277; *Baum v. Mullen*, 47 N. Y. 577; *Vail v. Meyer*, 71 Ind. 159; *Griffin v. Ransdell*, Id. 440; *Patten v. Patten*, 75 Ill. 446; *McLaren v. Hall*, 26 Iowa, 297; *Porter v. Haley*, 53 Miss. 66, 30 Am. Rep. 502; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436.

³⁰ *Bodine v. Killeen*, 53 N. Y. 98; *Lane v. Lockridge's Ex'x* (Ky.) 48 S. W. 975; *Hoene v. Pollak*, 118 Ala. 617, 24 South. 349, 72 Am. St. Rep. 189. Cf. *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. 870, 4 L. R. A. 333, 16 Am. St. Rep. 683.

³¹ *Weisbrod v. Railway Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235.

³² *Sanford v. Johnson*, 24 Minn. 172.

³³ *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38; *Walker v. Carlington*, 74 Ill. 446; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 6 N. W. 88; *Wilcox v. Todd*, 64 Mo. 390; *Troy Fertilizer Co. v. Zachry*, 114 Ala. 177, 21 South. 471.

³⁴ *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38.

while it is generally true that what a person has a right to do himself he may authorize another to do for him, it does not necessarily follow that because power to act in person has been conferred by statute the power may be exercised by agent or attorney.⁵⁵ Whether this result follows depends upon the terms of the enabling statute. Frequently such statutes have been construed with extreme strictness. Thus, under statutes empowering a married woman to convey her lands by deed executed by herself and her husband, and requiring her separate examination and acknowledgment to be certified thereon, it has been held in numerous cases that she can convey only in the manner prescribed, and that a deed executed on behalf of husband and wife by attorney, pursuant to a power of attorney executed by them jointly and acknowledged and certified in the manner required for a deed, is inoperative to convey her title.⁵⁶ A more liberal construction of like statutory provisions has recently been adopted by the Supreme Court of the United States, and a similar power was sustained, upon the ground that there was nothing in the terms of the statute to exclude the natural implication that a power to convey includes the power to appoint another to make the conveyance.⁵⁷ A consideration in detail of the power of married women to

⁵⁵ Ante, p. 91.

⁵⁶ *Sumner v. Conant*, 10 Vt. 9; *Lewis v. Coxe*, 5 Har. (Del.) 401; *Mott v. Smith*, 16 Cal. 533; *Gillespie v. Worford*, 2 Cold. (Tenn.) 632; *McCreary v. McCorkle* (Tenn. Ch. App.) 54 S. W. 53; *Holland v. Moon*, 39 Ark. 120.

See, also, *Holladay v. Dally*, 19 Wall. (U. S.) 606, 609, 22 L. Ed. 187; *Earle's Adm'rs v. Earle*, 20 N. J. Law, 347; *Steele v. Lewis*, 1 T. B. Mon. (Ky.) 43; *Bishop, Mar. Wom.* § 602.

⁵⁷ Under the laws of Maryland which were in force in the District of Columbia in 1859, a married woman owning real estate in the District, which she had power to convey by deed joined in by her husband, and privily acknowledged by her, might, by a power of attorney similarly executed in another state, authorize an attorney to execute such conveyance in her behalf. *Williams v. Paine*, 169 U. S. 55, 19 Sup. Ct. 279, 42 L. Ed. 658, affirming 7 App. D. C. 116. *Peck-*

appoint agents, depending, as it does, upon the enactments of the different states, is beyond the scope of this book.

Aliens.

Aliens have generally the same power to contract, and consequently to appoint agents, that other persons have, though in some states they are by statute prohibited from acquiring or holding land.³⁸ War, however, suspends all commercial intercourse between the belligerent countries, except so far as may be allowed by the sovereign authority, and in consequence all contracts between the citizens of the belligerents which tend to increase the resources of the enemy or look to or involve any kind of trading or commercial dealing between the two countries are prohibited.³⁹ And it has been held that an alien enemy cannot appoint an agent within the United States for any purpose.⁴⁰ Yet war does not necessarily terminate an agency unless it involves such prohibited intercourse.⁴¹

Corporations.

Within the limits of the powers conferred by its charter a corporation may appoint an agent. Indeed, a corporation, being impersonal, can act only through the intervention of agents.⁴² Frequently, the power to appoint officers and agents is expressly conferred by charter, but the power to appoint agents is inherent in all private corporations.⁴³

ham, J., said: "When the power is given her by law to convey directly, she can by the same ceremonies authorize another to do the act for her. The reasoning which would prevent it is, as we think, entirely too technical, fragile, and refined for constant use."

³⁸ Clark, Contr. 216.

³⁹ *Keershaw v. Kelsey*, 100 Mass. 561; *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658; *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

⁴⁰ *United States v. Grossmayer*, 9 Wall. (U. S.) 72, 19 L. Ed. 627.

⁴¹ Post, p. 149.

⁴² Ante, p. 30.

⁴³ *Hurlbut v. Marshall*, 62 Wis. 590, 22 N. W. 852; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *St. Andrews Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340; *Clark, Corp.* 482.

A mere unincorporated association, not being a legal entity, is incapable of appointing an agent.⁴⁴

CAPACITY OF PARTIES—AGENT—CAPACITY TO ACT.

22. All persons [of sound mind],¹ including persons incapable of contracting on their own behalf, are competent to act as agents.

SAME—CAPACITY TO ENTER INTO CONTRACT OF AGENCY.

23. Capacity to enter into a contract of agency is coextensive with the capacity of the agent to contract.

Inasmuch as the act of an agent is in law the act of his principal, incapacity of the agent to make a binding contract on his own behalf does not debar him from making a binding contract on the part of his principal. "Monks, infants, fem covert², persons attainted, outlawed, excommunicated, villeins, aliens, &c., may be attorneys."³ So during the existence of slavery in this country it was held that "a slave, who is homo non civilis, a person who is little above a brute in legal rights, may act as the agent of his owner or hirer."⁴ Different considerations, of course, apply to the contract of agency entered into between principal and agent. Here the agent contracts on his own behalf, and the validity and effect of the contract depend upon his contractual capacity.⁵

⁴⁴ Post, p. 111.

§§ 22-23. ¹ As to the qualification of the rule introduced by the words in brackets, post, p. 106.

² As to alien enemies, see ante, p. 104.

³ Co. Litt. 52a. See, also, Perkins, Prof. Bk. §§ 184-187. In some states it is enacted that any person may be an agent. Cal. Civ. Code, § 2296.

⁴ Lyon v. Kent, 45 Ala. 656. See, also, Powell v. State, 27 Ala. 51; Stanley v. Nelson, 28 Ala. 514; Chastain v. Bowman, 1 Hill (S. C.) 270.

⁵ Ante, p. 17.

Married Women.

In spite of the legal fiction of the common law that husband and wife are one person, the capacity of a married woman to act, even as agent or attorney of her husband,⁶ or of a third person dealing with him,⁷ has always been recognized. Within the scope of the authority conferred, the husband was bound by her acts and admissions. She might also be the agent of another in dealing with other persons.⁸ Of course, no express or implied contract of agency could exist between principal and agent in any such case. How far such a contract can exist between a husband and wife, where either acts as agent of the other, under the enabling statutes of the present day, depends, of course, upon the terms and construction of the enactments of the different states.

Lunatics.

It is laid down by Story "that an idiot, lunatic, or person otherwise non compos mentis cannot do any act, as an agent or attorney, binding upon the principal; for they have not any legal discretion or understanding to bestow upon the affairs of others, any more than upon their own."⁹ Yet

⁶ Anon., 1 Str. 527; *Emerson v. Blonden*, 1 Esp. 142; *Prestwick v. Marshall*, 7 Bing. 565; *Plimmer v. Sells*, 1 N. & M. 422; *Pickering v. Pickering*, 6 N. H. 124; *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532; *Mackinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; *Hopkins v. Mollinleux*, 4 Wend. (N. Y.) 465; *Edgerton v. Thomas*, 9 N. Y. 40; *Cantrell v. Colwell*, 3 Head (Tenn.) 471.

⁷ Co. Litt. 52a; *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; Story, Ag. § 7.

⁸ Story, Ag. § 7.

"A feme covert cannot be an agent for another than her husband except by his consent, in which case he is bound by her acts." Ga. Code (1895) § 3001. Cf. *Tucker v. Cocke*, 32 Mass. 184.

⁹ Story, Ag. § 7. See, also, *Mechem*, Ag. § 58; *Ewell's Evans*, Ag. 171.

"Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another." *Lyon v. Kent*, 45 Ala. 656, per Peters, J.

"Any person may be appointed an agent who is of sound mind." Ga. Code (1895) § 3001.

many simple acts of agency can be as well performed by an insane person as by one of sound mind, and it cannot be doubted that such acts of an insane agent would be binding upon the principal. And at the present day, when the contracts of the lunatic himself are voidable and not void, and if executed cannot be avoided if the other party was ignorant and acted in good faith and cannot be placed in statu quo,¹⁰ it is improbable that it would be held without exception that a person non compos mentis cannot, as agent, do any act binding upon his principal. The effect of the agent's insanity upon the rights of the principal and of third persons does not appear to have come before the courts.

Infants.

An infant may act as agent, and his acts in that capacity are binding upon his principal.¹¹ It has been suggested that this rule is subject to the qualification that the infant must possess sufficient mental capacity for the business intrusted to him,¹² but unless advantage were taken of the tender years of an infant agent by the person dealing with him the principal would apparently have no ground for avoiding responsibility. So far as concerns the contract of agency, the infant may, of course, avoid it like other contracts.¹³

Other Party—Statute of Frauds.

There is no inherent reason why one party to a contract may not act for the other in preparing and signing an in-

¹⁰ Ante, p. 98.

¹¹ *Watkins v. Vince*, 2 Stark. 368; *In re D'Angiban*, L. R. 15 Ch. D. 228; *Com. v. Holmes*, 119 Mass. 195; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

¹² *Wharton*, Ag. § 15; *Mechem*, Ag. § 59; *Lyon v. Kent*, 45 Ala. 656.

¹³ *Vasse v. Smith*, 6 Cranch (U. S.) 226, 3 L. Ed. 207; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 376; *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Widrig v. Taggart*, 51 Mich. 103, 16 N. W. 251.

strument which contains its terms,¹⁴ or even as attorney for the other in executing an instrument in its performance. Thus, under a mortgage containing a power of sale, which provides that the mortgagee may purchase at the sale, and that the deed to the purchaser may be made by the mortgagee as attorney of the mortgagor, it has been held that such a deed executed by the mortgagee as attorney directly to himself is valid.¹⁵ Under the seventeenth section of the statute of frauds,¹⁶ however, a party to a contract of sale may not, as agent of the party to be charged, execute the "note or memorandum" provided for. The statute provides for a note or memorandum to be "made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized," and this language has been construed to mean that the agent must be some third person, and not the other contracting party; for to hold otherwise would open the door to the fraud which the statute was intended to prevent.¹⁷ Under the fourth section, providing that the writing shall be signed by "the party to be charged therewith, or some other person thereunto by him lawfully authorized," the same rule prevails.¹⁸

¹⁴ A memorandum of an agreement, not required by the statute of frauds, made by one party in a book of the other, in his presence and at his request, is evidence against him. *Snyder v. Welford*, 33 Minn. 175, 22 N. W. 254, 53 Am. Rep. 22.

¹⁵ *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; *Woonsocket Inst. for Savings v. Worsted Co.*, 13 R. I. 255; *Jones, Mtg.* § 1892. But see remarks of *Walton, J.*, in *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386.

¹⁶ 29 Car. II, c. 3, § 17.

¹⁷ *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Wright v. Dannah*, 2 Camp. 203; *Fairbrother v. Simmons*, 5 B. & Ald. 333 (memorandum signed by auctioneer, suing as seller); *Smith v. Arnold*, 5 Mason (U. S.) 414, Fed. Cas. No. 13,004; *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Johnson v. Buck*, 35 N. J. Law, 338, 342, 10 Am. Rep. 243; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385.

The rule does not, however, exclude the agent of the seller from acting as agent of the buyer. *Durrell v. Evans*, 30 L. J. Ex. 354, 6 H. & N. 660. See *Benjamin, Sales*, §§ 267, 267a; *Tiffany, Sales*, 77.

¹⁸ *Smith v. Arnold*, 5 Mason (U. S.) 414, Fed. Cas. No. 13,004;

Person Adversely Interested.

It is sometimes said that a person cannot become agent in a transaction where he has an interest or a duty which is adverse to that of his principal. Thus it is said that a person cannot act as agent in buying his own goods, and that at a sale made for his principal he cannot become the buyer.¹⁹ But while an agent will not be permitted to assume a position in which his interest is antagonistic to that of his principal, and if he does so the principal may disaffirm the transaction, adverse interest does not incapacitate the agent. Indeed, the right of the principal to affirm rests upon the very basis of agency.²⁰ This subject will be discussed in treating of the duties of the agent to his principal.²¹

Unlicensed Agent—Attorney at Law.

There are numerous statutes, enacted for the purpose of protecting the public in dealings with certain classes of agents, principally attorneys at law²² and brokers,²³ which require them to procure a license or certificate as a condition precedent to the right to engage in business. The effect of noncompliance by such persons with these statutes is to preclude them from recovering compensation from their employers for services rendered.²⁴ In Michigan, under a constitutional provision that any person shall have the right

Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Browne*, Stat. Frauds, § 367.

¹⁹ Story, Ag. § 9.

²⁰ Wharton, Ag. § 18.

²¹ Post, p. 420.

²² *Ames v. Gilman*, 10 Metc. (Mass.) 239; *Hall v. Bishop*, 3 Daly (N. Y.) 109; *Tedrick v. Hiner*, 61 Ill. 189; *Hittson v. Browne*, 3 Colo. 304; *McIver v. Clarke*, 69 Miss. 408, 10 South. 581. Cf. *Harland v. Lillenthal*, 53 N. Y. 438.

²³ *Cope v. Rowlands*, 2 M. & W. 149; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 637; *Stevenson v. Ewing*, 87 Tenn. 49, 9 S. W. 230.

²⁴ Cases cited, notes 22 and 23, *supra*. See *Clark*, Contr. 391; post, p. 450.

to prosecute or defend his suit in person "or by an attorney or agent," the word "agent" was construed as synonymous with "attorney," and it was held that a party to a suit could not appear by an agent who was not licensed as attorney.²⁵

JOINT PRINCIPALS.

24. Two or more persons may become joint principals by authorizing a third person or one of their number to act on behalf of all.

In General.

Capacity to appoint an agent must be distinguished from authority to appoint. "Capacity means power to bind oneself; authority means power to bind another. * * * Capacity is usually a question of law; authority is usually a question of fact."¹ Two or more persons, if they are individually capable, may appoint an agent, either one of themselves or a third person, to act for them in a transaction in which they are jointly interested, thus becoming joint principals. The assent of all the principals to the creation of the agency is, of course, required. Authority to act, or to appoint an agent to act, on behalf of all, is not conferred upon one of several persons because of common interest or common ownership. Thus, one of several joint tenants or tenants in common of land or chattels has not, as such, power to sell or to authorize the sale of anything more than his individual interest.² To authorize a sale of the whole, all must concur in the appointment of the agent or in ratification of his act.³

²⁵ Cobb v. Judge, 43 Mich. 289, 5 N. W. 309.

§ 24. ¹ Chalmers, Sale of Goods, 6.

² Sims v. Dame, 113 Ind. 127, 15 N. E. 217; Richey v. Brown, 58 Mich. 435, 25 N. W. 386; Tipping v. Robbins, 64 Wis. 546, 25 N. W. 713.

³ Keay v. Fenwick, L. R. 1 C. P. D. 745.

Same—Partnership.

The rule in the case of partners, although apparently different, rests upon the same principle. By virtue of the relation existing between partners, each is virtually both principal and agent.⁴ Each has authority, unless the authority is expressly limited, to bind the firm and its members by any act necessary for carrying on the partnership business, and this authority extends to the appointment of agents, so far as proper and necessary for that purpose. The assent of all the partners to such appointment is given by implication in advance by their assent to the formation of a partnership relation. To the appointment of an agent for any purpose not within the scope of the partnership, and hence not embraced within their original assent, the concurrence of all the partners is requisite.⁵

Same—Voluntary Association.

Voluntary unincorporated associations, the object of which is not to share profits, such as clubs, social, charitable and religious societies, and the like, are not partnerships, and consequently their members, as such, are not liable for each other's acts.⁶ If the members are liable at all for acts done on behalf of the association, it must be because they directly participate in the acts,⁷ or because they authorize or ratify them. Authority is not implied from the mere fact of association.⁸ Authority may, indeed, be conferred in advance by accepting membership in an association whose constitu-

⁴ Pooley v. Driver, 5 Ch. D. 458. See George, Partn. 49, 212.

⁵ Beckham v. Drake, 9 M. & W. 79; Lucas v. Bank, 2 Stew. (Ala.) 220; Durgin v. Somers, 117 Mass. 55; Burgan v. Lyell, 2 Mich. 102. 55 Am. Dec. 53; George, Partn. 218.

⁶ George, Partn. 24.

⁷ Cross v. Williams, 7 H. & N. 675.

⁸ Flemyng v. Hector, 2 M. & W. 172; Lafond v. Deems, 81 N. Y. 507; Ash v. Gule, 97 Pa. 493, 39 Am. Rep. 818; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716; Blakely v. Bennecke, 59 Mo. 193; McCabe v. Goodfellow, 133 N. Y. 89, 80 N. E. 728, 17 L. R. A. 204; Lewis v. Tilton, 64 Iowa, 620, 19 N. W. 911, 52 Am. Rep. 436. See, also, Winona L. Co. v. Church, 6 S. D. 498, 62 N. W. 107.

tion or articles of association expressly provide, for example, that authority to bind the members shall be vested in its officers, or that contracts may be entered into on behalf of the association when authorized by vote of a majority.⁹ In other cases, it must be shown that the member sought to be charged has by words or conduct authorized the act or contract in question.¹⁰

JOINT AGENTS.

25. Authority may be given to two or more persons jointly or severally. When authority of a private nature is given to two or more persons, unless the principal has manifested a different intention, the authority is presumed to be joint, and all must join in its execution. A different rule of interpretation prevails when the authority is of a public nature.

A principal may give authority to two or more agents as well as to a single agent to do an act. Where two or more agents are appointed, the intention of the principal must determine whether the authority is joint or several; that is, whether it must be exercised by all or may be exercised

⁹ *Fleming v. Hector*, 2 M. & W. 172; *Todd v. Emly*, 8 M. & W. 505; *Davison v. Holden*, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40; *Bennett v. Lathrop*, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222.

¹⁰ *Ray v. Powers*, 134 Mass. 22. See, also, cases cited note 8, *supra*.

Where a college class at a class meeting voted to publish a book, the members voting or assenting to the vote were liable for the expense at the suit of the printer under a contract with a member elected as business manager. *Willcox v. Arnold*, 162 Mass. 577, 39 N. E. 414. "Every member present assents beforehand to whatever the majority may do. * * * If he would escape responsibility, * * * he ought to protest and throw up his membership on the spot." *Eichbaum v. Irons*, 8 Watts & S. (Pa.) 67, 40 Am. Dec. 540, per Gibson, C. J. See, also, *Abels v. McKeen*, 18 N. J. Eq. 462.

Authority may be shown by acquiescence in a course of dealing from which assent is to be inferred. *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505.

by one. Yet such powers of attorney and appointments of agents are construed with great strictness,¹ and where authority is given to two or more, unless a different intention is expressed or is clearly to be inferred, the authority is presumed to be joint.² Thus, if a power of attorney is given to A. and B. to sell or convey land, and the instrument contains nothing to indicate that one alone may act, both must join in a sale or conveyance. On the other hand, if an intention to confer a several authority is manifest, it will be given effect.³ Thus, if authority is given to A. and B., or either of them, execution by both or either is good. And where power was given by the principal to fifteen "jointly and separately * * * to sign and underwrite all such policies as they, his said attorneys, or any of them, should jointly and separately think proper," a policy executed by four was held binding.⁴ For this reason, where a principal appoints a partnership as his agent, each partner may execute, since the act of one partner is the act of the firm, and it is to be assumed that the principal made the appointment in view of the rules ordinarily governing the transaction of the business of a partnership.⁵ Story says that "in commercial transactions a more liberal interpretation in favor of trade is admitted, as thereby public confidence, as well as general convenience, is best consulted."⁶ This more liberal interpretation rests, as in other cases, upon the supposed intention of the principal, in determining which the character

§ 25. ¹ For example, Coke lays it down that a power of attorney to three jointly and severally, although it may be executed by all or one, may not be executed by two. Co. Litt. 181b.

² *Copeland v. Insurance Co.*, 6 Pick. (Mass.) 198; *Salisbury v. Brisbane*, 61 N. Y. 617; *Rollins v. Phelps*, 5 Minn. 403 (Gil. 373).

³ *Hawley v. Keeler*, 53 N. Y. 116; *French v. Price*, 24 Pick. (Mass.) 13.

⁴ *Guthrie v. Armstrong*, 5 B. & Ald. 628.

⁵ *Kennebec Co. v. Banking Co.*, 6 Gray (Mass.) 204; *Deakin v. Underwood*, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827.

⁶ Story, Ag. § 44.

of the agency is a material circumstance. The rules governing the construction of authority will be considered later.⁷

The rules which relate to the authority of directors as agents of a corporation rest upon considerations which do not apply to other private agents.⁸

Same—Public Agents.

A different rule of construction or interpretation prevails where the agency is of a public nature. This distinction was pointed out by Coke, who gave as an illustration the case of a warrant by a sheriff "to four or three jointly or severally to arrest the defendant," two of whom might arrest him, "because it is for the execution of justice, and therefore shall be more favorably expounded than when it is only for private."⁹ The most frequent application of the distinction is where authority is to be exercised by persons forming a board or other body constituted by law, such as inspectors, commissioners, overseers of the poor, assessors, and the like. In these cases, unless the law otherwise provides, if all meet, the act of the majority will bind.¹⁰ And, if all have been

⁷ Post. p. 166 et seq.

⁸ Directors can bind the corporation only when regularly assembled at a board meeting. Unless this meeting is a stated one, notice must be given to each director, but if all are present want of notice is immaterial. A majority is a quorum, and a majority of the quorum may bind the corporation. These rules apply when the charter does not provide otherwise. *Clark, Corp.* 488 et seq. Generally speaking, a committee of a corporation is subject to the same rules. *McNeill v. Chamber of Commerce*, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559.

⁹ Co. Litt. 181b. A warrant of distress addressed to two may be executed by one. *Lee v. Vesey*, 1 H. & N. 90.

¹⁰ *King v. Beeston*, 3 T. R. 592 (church wardens and overseers of a parish); *Grindley v. Barker*, 1 B. & P. 229 (triers or inspectors of leather); *Corlis v. Kent Waterworks*, 7 B. & C. 314; *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Williams v. School Dist.*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Cooley v. O'Connor*, 12 Wall. (U. S.) 391, 20 L. Ed. 446;

duly notified to meet, it is generally held that an act performed by a majority who have met is valid.¹¹

Martin v. Lemon, 26 Conn. 192; *Scott v. Lessee*, 1 Doug. (Mich.) 119; *Soens v. City of Racine*, 10 Wis. 271.

¹¹ *Williams v. School Dist.*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Damon v. Inhabitants of Granby*, 2 Pick. (Mass.) 345; *George v. School Dist.*, 6 Metc. (Mass.) 497; *Martin v. Lemon*, 26 Conn. 192. The authorities are fully collected and discussed in *First Nat. Bank v. Town of Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734. This was an action upon interest coupons attached to bonds purporting to have been issued by defendant town. Plaintiff relied upon an instrument of assent, to which was appended a certificate of two of three commissioners appointed under an act making such certificate conclusive evidence of the facts set forth. It was held that the act of two, the third sharing in the deliberations of the commissioners, but refusing to concur in their decision, was a sufficient compliance with the law.

CHAPTER V.

DELEGATION BY AGENT—SUBAGENTS.

- 26. Delegation of Authority.
- 27-28. When Authority to Delegate will be Implied.
- 29. Responsibility for Acts of Subagent—Privity of Contract.
- 30. When Authority to Create Privity of Contract will be Implied.

DELEGATION OF AUTHORITY.

- 26. An agent has no power to delegate his authority to a subagent, or to appoint a deputy or a substitute, to do any act on behalf of his principal, unless authority so to do has been expressly or impliedly conferred.

Delegata Potestas non Potest Delegari.

As we have seen, what a man can do in his own right he can as a rule delegate to an agent,¹ and the act of the agent, within the scope of the authority conferred, is in law the act of the principal. Qui facit per alium facit per se. And, conversely, an act which a person performs on behalf of another is not the act of and binding upon the other, unless he has authorized that person to perform it. It follows that an act which an agent causes to be performed by a third person on behalf of his principal is not the act of the principal, unless he has authorized the agent to cause the act so to be done; in other words, unless the principal has authorized the agent to appoint a subagent to do the act.²

§ 26. ¹ Ante, p. 90.

² "If a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person has been held liable, under the doctrine referred to [*respondeat superior*], for the negligence of another, that other was engaged either by the defendant personally or by others by his authority, express or implied." *Haluptzok v. Railway Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739, per Mitchell, J.

An agent, as such, has no power to appoint a subagent.² Delegata potestas non potest delegari—delegated authority cannot be delegated. This maxim has, of course, no application where power to delegate has been expressly conferred or may reasonably be implied.

WHEN AUTHORITY TO DELEGATE WILL BE IMPLIED.

27. MINISTERIAL ACTS. Authority to delegate the performance of acts which are ministerial, or do not involve the exercise of discretion, will be implied unless such authority is expressly denied.

28. OTHER ACTS. Authority to delegate the performance of acts which involve the exercise of discretion will be implied when, from the circumstances of the particular agency, it may reasonably be inferred that the principal intends to confer such authority.

Distinction between Discretionary and Ministerial Acts.

The appointment of an agent is usually made because of his supposed fitness, as by reason of his possession of judgment, skill, integrity, or other personal qualifications. Inasmuch as confidence in the particular person employed is the basis of the appointment, authority to delegate the performance of the subject-matter of the agency will not, in the absence of peculiar circumstances, be implied.¹ Thus, where

² *Palliser v. Ord*, Bunbury, 166.

§§ 27-28. ¹ *Catlin v. Bell*, 4 Camp. 183; *Henderson v. Barnwell*, 1 Y. & J. 387; *Emerson v. Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319; *Lewis v. Ingersoll*, 3 Abb. Dec. (N. Y.) 55; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Ruthven v. Insurance Co.*, 92 Iowa, 316, 60 N. W. 663; *Waldman v. Insurance Co.*, 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883; *Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053.

Where plaintiff intrusted to a shipmaster trading to the West Indies goods, which he undertook to sell for her there, it was not a defense, in an action for an accounting, that defendant, not being able to sell them there, had sent them elsewhere in search of a market, where

goods are consigned to a factor, the factor has ordinarily no authority to deliver over the goods to a third person for sale, and such a disposition of the goods would be a conversion.² So, a person authorized to sell land must exercise his own judgment and discretion, and cannot delegate the performance of his agency to another.³ So, a person authorized to accept bills of exchange or make promissory notes must exercise his judgment as to the necessity or propriety of accepting a bill or executing a note, and, in the absence of circumstances peculiar to the particular agency, authority to delegate the performance of these duties will not be implied.⁴ So, an agency to collect and receive money, reposing in personal trust and confidence, may not be delegated without authority.⁵

they were destroyed by an earthquake. Lord Ellenborough clearly held that, there being a special confidence reposed in the defendant, he had no right to hand them over to another, and to give them a new destination. *Catlin v. Bell*, *supra*.

"One who has a blank power or authority from another to do any act must execute it himself, and cannot delegate it to a stranger; for, this being a trust or confidence reposed in him personally, it cannot be assigned to one whose integrity or ability may not be known to the principal, and who, if he were known, might not be selected by him for such a purpose. The authority is expressly personal, unless, from the express language used, or from the fair presumptions growing out of the particular transaction, a broader power was intended to be conferred." *Wright v. Boynton*, *supra*, per Bell, J.

A contract between an agent and a third person, giving the latter entire control of the business of the agency, although unauthorized, and hence not binding upon the principal, held not void as against public policy. *Peterson v. Christensen*, 26 Minn. 377, 4 N. W. 623.

² *Cockran v. Irlam*, 2 M. & S. 301; *Warner v. Martin*, 11 How. 223, 13 L. Ed. 667; *Campbell v. Reeves*, 3 Head (Tenn.) 228. See *Southern v. How*, Cro. Jac. 468.

³ *Tynan v. Dulling* (Tex. Civ. App.) 25 S. W. 465, 818; *Carroll v. Tucker*, 3 Misc. Rep. 397, 21 N. Y. Supp. 952.

⁴ *Emerson v. Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501.

⁵ *Lewis v. Ingersoll*, 3 Abb. Dec. 50; *Fellows v. Northrup*, 39 N. Y. 117.

Where the agency is general, to take charge of and manage the

On the other hand, if an act is purely ministerial, and consequently does not involve the exercise of judgment or discretion, it is to be assumed that the principal is willing to have it performed by any person whom the agent may appoint. The principal may, of course, so limit the authority that every such act must be performed by the very hand of the agent. But, in the absence of such express limitation, authority to delegate the performance of ministerial acts is implied.⁶ Thus, an agent having authority to make contracts, accept bills of exchange, or execute promissory notes, may, after exercising his judgment as to the terms of a contract or the propriety of accepting a bill or executing a note, delegate to another the mechanical duty of reducing the contract to writing or signing the paper.⁷ So, an agent authorized to sell land, who has examined the land and fixed the price, may avail himself of the services of another to find a purchaser and conclude a sale upon the terms fixed.⁸

When Power to Delegate will be Implied.

Although power to delegate, except as to ministerial acts, will not be implied as a mere incident to the authority of an agent, it may be implied from the circumstances of the particular agency, and will be implied whenever, from the

business of the principal, power to delegate may be implied. *McConnell v. Mackin*, 22 App. Div. 537, 48 N. Y. Supp. 18.

⁶ *Lord v. Hall*, 8 C. B. 627; *Mason v. Joseph*, 1 Smith, 406; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Williams v. Wood*, 16 Md. 220; *Newell v. Smith*, 49 Vt. 255; *Grinnell v. Buchanan*, 1 Daly (N. Y.) 538; *Eldridge v. Holway*, 18 Ill. 445; *Grady v. Insurance Co.*, 60 Mo. 116; *Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22. Cf. *Rossiter v. Trafalgar L. Ass'n*, 27 Beav. 377, 381.

⁷ *Exp. Sutton*, 2 Cox, 84; *Lord v. Hall*, 2 C. & K. 698; *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Norwich University v. Denny*, 47 Vt. 13 (subscription agreement); *Grady v. Insurance Co.*, 60 Mo. 116 (insurance policy).

⁸ *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367.

An agent to sell land may employ another to point out the land to a purchaser. *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178.

peculiar circumstances, it may reasonably be inferred that the principal intended such power to exist.⁹ The question turns, as do other questions involving the power of agents, upon the construction and interpretation of the particular grant of authority.¹⁰

Thus, power of delegation may be implied from the previous course of dealing, or from the knowledge of the principal that an agent is in the habit of conducting his business by means of subagents.¹¹ It will be implied where, from the nature of the business which is the subject of the agency, it is necessary or reasonable that it should be conducted by means of subagents.¹² For example, where a note is deposited with a bank for collection, authority to employ a notary to protest it in case of dishonor is necessarily implied,¹³ and if the note is payable at a distant place authority to employ the agency of a bank at the place of payment is necessarily implied.¹⁴ So, authority to prosecute a suit implies authority to employ an attorney to conduct it.¹⁵ And, if a principal knows that the business which he intrusts to an agent is so extensive that he cannot transact

⁹ *De Bussche v. Alt*, 8 Ch. D. 286, per Thesiger, L. J.

¹⁰ *Post*, p. 166.

¹¹ *Quebec & R. R. Co. v. Quinn*, 12 Mo. P. C. 232; *Warner v. Martin*, 11 How. (U. S.) 223, 13 L. Ed. 667; *Johnson v. Cunningham*, 1 Ala. 249; *Loomis v. Simpson*, 13 Iowa, 532.

¹² *De Bussche v. Alt*, 8 Ch. D. 286; *Quebec & R. R. Co. v. Quinn*, 12 Mo. P. C. 223; *Rossiter v. Trafalgar L. A. Ass'n*, 27 Beav. 377; *Johnson v. Cunningham*, 1 Ala. 249; *Planters' & Farmers' Nat. Bank v. Bank*, 75 N. C. 534.

A stockbroker may act through a subagent where the purchase or sale is to be made in a distant city. *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

¹³ *Warren Bank v. Bank*, 10 Cush. (Mass.) 582; *Baldwin v. Bank*, 1 La. Ann. 13, 45 Am. Dec. 72.

¹⁴ *Dorchester & Milton Bank v. Bank*, 1 Cush. (Mass.) 177. See, also, cases cited, p. 129, notes 6 and 7.

¹⁵ *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 896.

it without employing subagents, authority to do so is implied.¹⁶

Power to delegate will be implied where the employment of a subagent is justified by the usage of the business or trade in which the agent is employed,¹⁷ provided the usage is not inconsistent with the express terms of the authority.¹⁸ Thus, where, by usage of trade, a factor is authorized to employ another person to dispose of the property, such authority is implied.¹⁹ In many cases where authority is to be implied from the nature of the business it may also be implied from usage or custom.

Same—Unforeseen Emergencies.

It is said that power to delegate will also be implied where, in the course of the agency, unforeseen emergencies arise which impose upon the agent the necessity of employing a subagent.²⁰ But the limits of this doctrine are not clearly defined, and it must be applied with caution. In this country

¹⁶ *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721; *Grady v. Insurance Co.*, 60 Mo. 116.

"We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of 'Delegatus non potest delegare' does not apply in such a case." *Bodine v. Insurance Co.*, supra, per Earl, J.

¹⁷ *Warner v. Martin*, 11 How. (U. S.) 223, 13 L. Ed. 667; *Johnson v. Cunningham*, 1 Ala. 249; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Smith v. Sublett*, 28 Tex. 163.

¹⁸ *Emerson v. Hat Co.*, 12 Mass. 237, 7 Am. Dec. 66.

¹⁹ *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440.

²⁰ *De Bussche v. Alt*, 8 Ch. D. 286, per Thesiger, L. J.; *Story*, Ag. § 201.

it has sometimes been held that the conductor of a train has implied authority, on the ground of necessity, in such an emergency as the sickness or absence of a brakeman, to employ another person to take his place, and that such person for the time being is the servant of the railway company.²¹ In a recent English case,²² where the driver of the defendants' omnibus, being the worse for liquor, was ordered by a police inspector to discontinue driving, it was held by the trial court that under the circumstances the conductor and driver had implied authority to authorize a volunteer to drive the omnibus home, a distance of a quarter of a mile, and that the defendants were liable for an injury caused by his careless driving to a foot passenger. In the court of appeal²³ the judgment was reversed upon the ground that the evidence did not justify a finding that there was a necessity to delegate the duty of driving the omnibus. The court said that it was not necessary to decide "whether, if there

²¹ *Sloan v. Railway Co.*, 62 Iowa, 728, 16 N. W. 331; *Fox v. Railway Co.*, 86 Iowa, 868, 53 N. W. 259, 17 L. R. A. 289; *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 518, 3 South. 764; *Id.*, 85 Ala. 203, 4 South. 711.

In *Sloan v. Railway Co.*, *supra*, the regular brakeman absented himself for a week, and plaintiff took his place with the knowledge and consent of the conductor, but of no superior officer. On the sixth day of his employment plaintiff was ordered by the conductor to perform a duty, in discharging which he was injured. It was held that he could recover under a statute making railway corporations liable for damages sustained by employes in consequence of the neglect of other employes. This case certainly pushes the doctrine of authority of necessity beyond its rational limits.

²² *Gwilliam v. Twist* [1895] 1 Q. B. 577.

²³ *Gwilliam v. Twist* [1895] 2 Q. B. 84. Lord Escher said: "I am very much inclined to agree with the view taken by Eyre, C. J., in the case of *Nicholson v. Chapman*, 2 H. Bl. 254, and by Parke, B., in the case of *Hawtayne v. Bourne*, 7 M. & W. 595, to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for honor of the drawer." See *ante*, p. 39; *post*, p. 402.

were a necessity for a servant to delegate his duty to another person, that delegation would make that other person a servant of the master so as to render the latter responsible for his acts," but inclined to the opinion that the doctrine of authority by reason of necessity did not apply to such a state of facts.

RESPONSIBILITY FOR ACTS OF SUBAGENT—PRIVITY OF CONTRACT.

29. Where a subagent is appointed by authority of the principal, the subagent is, so far as relates to third persons, the agent of the principal, and the acts of the subagent are binding upon the principal; but whether, as between principal and subagent, the relation of principal and agent is created, so that the subagent is responsible to the principal, depends upon whether the agent has been authorized to employ the subagent on the principal's behalf—that is, to create privity of contract between them—or has been authorized simply to employ a subagent on his own responsibility.

If an agent without authority employs a subagent, the latter assumes no obligation towards the principal, since there is no privity of contract between them.¹ The subagent is responsible only to the agent, who is his employer, and he in turn is responsible to the principal for the acts of the subagent.² It does not follow, however, that because

§ 29. ¹ As to the duties of agent to principal, post. p. 395.

² *Stevens v. Babcock*, 3 B. & Ad. 354; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443.

Defendants were employed by plaintiff to aid him in selling land by obtaining offers and communicating them to plaintiff, together with such information as they could readily obtain, and by consummating a sale in case of acceptance. Defendants employed O., who obtained an offer for \$22.50, but reported to defendants that he had received an offer of \$10, per acre, which defendants bona fide reported to plaintiff, advising him it was a fair price, and a sale was consummated, O. accounting to defendants, and they to plaintiff, on

the employment of a subagent is authorized privity of contract is created between him and the principal, so that he is responsible to the principal, or that the agent is discharged from responsibility for the acts of the subagent.

Whenever the employment is authorized, the acts of the subagent are, indeed, binding upon the principal; or, in other words, the subagent is, so far as relates to third persons, the agent of the principal. But whether, as between principal and subagent, the relation of principal and agent is created by the employment depends upon the nature of the authority conferred upon the agent. The principal may confer authority upon any terms and subject to any conditions which he sees fit to impose. He may, on the one hand, authorize the employment of a subagent on his own half. In such case by the employment privity of contract is created between principal and subagent, who becomes thereby the agent of and responsible to the principal, and the agent discharges his whole duty if he exercises reasonable care in the selection of the subagent, and is not responsible for his acts or defaults. On the other hand, the principal may authorize the employment of a subagent simply on the agent's behalf; that is, at the agent's risk and upon his responsibility. In such case the principal is, of course, bound by the acts of the subagent, because he has consented to be bound by them; but no privity of contract is created between him and the subagent, because he has not authorized the agent to make a contract of employment to which he (the principal) shall be a party. Privity of contract in such case exists only between the agent and the subagent, and the agent is responsible for the acts and defaults of the subagent, because such was the intention of the principal and the undertaking of the agent.

the basis of \$10, though O. obtained \$22.75 per acre. Held that, if O. was employed without plaintiff's express or implied consent, there being no usage or necessity therefor, no privity was created between plaintiff and O., and defendants were liable for the balance of the price received by O. *Barnard v. Coffin*, *supra*.

The same principles apply when the authority of an agent to employ a subagent is derived from ratification. The principal may, of course, ratify the unauthorized employment of a subagent; and, if he does so with knowledge that the subagent was employed as his agent, the ratification will be equivalent to previous authority to create privity of contract between them; but if the subagent was not so employed, or if the principal ratifies without such knowledge, the ratification will be equivalent only to previous authority to employ a subagent on the agent's own responsibility, and not to create privity of contract.³

If the terms of agency were always fully expressed, no difficulty in applying these principles would arise; but because the intention of the parties, and consequently the nature of the authority, is ordinarily matter of inference, difficult questions of fact are presented for determination.

³ "It is argued that, as the plaintiff knew before he signed the deed that the sale was made by Ochs, the plaintiff, by confirming the sale and signing the deed, ratified the employment of Ochs. If the plaintiff understood that Ochs was employed by the defendants as his agent, then these acts of the plaintiff might be held to be a ratification of his employment, and equivalent to an authority to the defendants to employ Ochs as the agent of the plaintiff. But if the plaintiff understood that the defendants employed Ochs as their agent to assist them in transacting the business which they had undertaken, then these acts of the plaintiff might only show that the plaintiff was willing that the defendants should transact the business by means of their servants or agents for whom they should be responsible; and it was competent for the court, on the evidence, to find that this was the understanding and intention of the plaintiff." *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443, per Field, J.

**WHEN AUTHORITY TO CREATE PRIVACY OF CONTRACT
WILL BE IMPLIED.**

- 30. Authority to create privacy of contract between principal and subagent will be implied when, from the circumstances of the particular agency, it may reasonably be inferred that the principal intends to confer such authority.**

Where, by power of attorney or other formal instrument, the employment of a substitute is expressly provided for, it is clear that the authority of the attorney or agent extends to establishing a direct relation between principal and substitute, and that the agent is responsible only for selecting a proper substitute.¹ In most cases, however, the authority of an agent to employ subagents is implied from the character of the business, the usages of trade or other circumstances peculiar to the agency, and the nature of that authority, depending upon the intention of the parties, must be inferred from the facts of the particular case.² Thus,

§ 30. ¹ *Wicks v. Hatch*, 62 N. Y. 535; *Story*, Ag. § 201.

² *De Bussche v. Alt*, 8 Ch. Div. 286; *New Zealand & A. L. Co. v. Watson*, 7 Q. B. D. 374; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; *Loomis v. Simpson*, 13 Iowa, 532; *National S. S. Co. v. Sheahan*, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782. Cf. *Bank of Kentucky v. Express Co.*, 93 U. S. 174, 23 L. Ed. 872.

"But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for that purpose, and where that is the case the reason of the thing requires that the rule [*delegatus non potest delegare*] should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a 'sub-agent' or 'substitute' (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity), and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privacy of contract between him and such substitute. And we are of opinion that an authority of the effect referred to may and should be implied where, from the conduct of the parties to the

where authority to employ a subagent is to be implied from the course of dealing of the parties or from the usages of trade, it may be clear from the particular course of dealing or usage that the principal intends, or must be deemed to intend, to authorize the agent to create privacy of contract.³

On the other hand, if the agent has undertaken the performance of a particular piece of business for his employer, and thus stands towards him, as it were, in the relation of independent contractor, it is clear that authority to employ subagents does not include authority to create privacy of contract between them and his employer, since by the very nature of the agent's contract he is to employ them upon his own responsibility.⁴ It is, indeed, often declared that, whenever authority to employ subagents is expressed or may be implied, privacy of contract between principal and sub-

original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privacy of contract arises between the principal and the substitute, and the latter becomes responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself." *De Bussche v. Alt*, 8 Ch. Div. 286, per Thesiger, L. J.

Cf. *New Zealand & A. L. Co. v. Watson*, *supra*, which does not seem reconcilable with the last case. But see *Bowstead*, Dig. Ag. 83, note (d). See, also, *Kaltenbach v. Lewis*, 10 App. Cas. 617, 636.

³ See *Cockran v. Irlam*, 2 M. & S. 301; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *McCants v. Wells*, 3 S. C. 569; *Id.*, 4 S. C. 381; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Whitlock v. Hicks*, 75 Ill. 460.

⁴ "The distinction between the liability of one who contracts to do a thing, and that of one who merely receives a delegation of authority to act for another, is a fundamental one. * * * If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant undercontractors or subagents, when de-

agent is created by the employment; * but such statements must usually be read in the light of the facts before the court, and cannot be supported as stating a rule unless "subagent" is used with the restricted meaning of "substitute" or of "agent for the principal." If the rule is so limited, it furnishes little practical guidance; for in doubtful cases the very question in controversy is whether the principal has authorized the employment to be made on his own behalf or on behalf of the agent. The difficulty of determining the intention of the parties is illustrated by the conflicting decisions referred to in the next paragraph.

Same—Bank as Agent—Deposit for Collection.

When a bank receives from a customer for collection a bill or note payable at a distant place, the parties necessarily contemplate that the bank shall send the paper to the place where it is payable, and shall employ some subagent there to collect and receive payment. So far as the debtor is concern-

faults occur injurious to his interest. * * * The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used." *Exchange Nat. Bank v. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, per Blatchford, J. And see cases cited, note 7, *infra*, for statements of this rule.

* *Wilson v. Smith*, 3 How. (U. S.) 763, 11 L. Ed. 820; *Campbell v. Reeves*, 3 Head (Tenn.) 226; and see *De Bussche v. Alt*, 8 Ch. Div. 286.

"A subagent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the subagent and the principal, who must, therefore, seek a remedy directly against the subagent for his negligence or misconduct." *Guelich v. Bank*, 58 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110.

ed, such subagent is the agent of the customer or principal, and payment to the subagent is binding upon the principal. The question remains whether privity of contract is created between principal and subagent, so that the subagent is directly responsible to the principal, and the home bank or agent is responsible only for due care in selection, or whether the subagent is agent of and responsible to the home bank, and it is responsible to the principal for the neglects and defaults of the subagent. If, as is sometimes done, the parties have expressed their intention in this regard, no difficulty arises. In the absence of any express agreement, the answer to the question depends upon the understanding to be implied from the deposit of the paper for collection, and in their interpretation of this transaction the courts have taken opposite views. By a majority of the courts in this country it is held that the home bank merely undertakes to use due care in transmitting the paper and in selecting a subagent.* By other courts,⁷ including the Supreme Court of the United

* *Dorchester & Milton Bank v. Bank*, 1 Cush. (Mass.) 177; *East Haddam Bank v. Scovill*, 12 Conn. 303; *Jackson v. Bank*, 6 Har. & J. (Md.) 146; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Hyde v. Bank*, 17 La. 580, 38 Am. Dec. 621; *Third Nat. Bank v. Bank*, 61 Miss. 112, 48 Am. Rep. 78; *Stacy v. Bank*, 12 Wis. 629; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; *Bank of Louisville v. Bank*, 8 Baxt. (Tenn.) 101, 35 Am. Rep. 691; *Daly v. Bank*, 56 Mo. 94, 17 Am. Rep. 663; *Guelich v. Bank*, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110; *First Nat. Bank v. Sprague*, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317; *Wilson v. Bank*, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. Numerous other cases are cited in the above.

⁷ *Allen v. Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *Ayrault v. Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Titus v. Bank*, 35 N. J. Law, 588; *Reeves v. Bank*, 8 Ohio St. 465; *Simpson v. Waldbly*, 63 Mich. 439, 30 N. W. 199; *Strelssguth v. Bank*, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213; *Power v. Bank*, 6 Mont. 251, 12 Pac. 597; *State Nat. Bank v. Manufacturing Co.*, 17 Tex. Civ. App. 214, 42 S. W. 1016. Numerous other cases are cited in the above. See, also, *Mackersy v. Remsay*, 9 Cl. & F. 818; *Van Wart v. Wooley*,

States,⁸ it is held that the bank undertakes to collect the paper, and thus assumes the liability of an independent contractor with responsibility for the acts and defaults of its subagents.

It is generally conceded on both sides that the decisive consideration is what was the understanding of the parties as to the duty the home bank undertakes to perform.⁹ The nature of this understanding, it is submitted, is really a question of fact. In declaring, on the one hand, that in such cases the undertaking of the home bank is to transmit to a suitable agent for collection, or, on the other hand, that the undertaking of the home bank is to collect, the court in effect lays down a more or less arbitrary rule of construction, based, indeed, upon the understanding which the court thinks likely to prevail in such cases, to which it resorts because the parties either have no intention on the point or have failed to express it. In view of the diversity of opinion among judges as to the understanding between parties to such a transaction, it is probable that an equal diversity of understanding exists among the parties themselves, and it would be difficult to say that one rule is better calculated to give effect to their intentions than the other. If, as intimated in *Exchange National Bank v. Third National Bank*,¹⁰ the question is to be determined "according to those principles which will best promote the welfare of the commercial community," it would seem that the rule adopted in that case, which does not compel the customer

8 B. & C. 439. *Of. Commercial Bank v. Bank*, 8 N. D. 382, 79 N. W. 859.

⁹ *Exchange Nat. Bank v. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722.

¹⁰ "The foundation for all the differences of opinion among the learned judges * * * appears clearly to rest in the interpretation of the implied contract between the depositor and the bank at the time the negotiable paper is deposited for collection." *Power v. Bank*, 6 Mont. 251, 12 Pac. 597, per McLeary, J.

¹¹ 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, per Blatchford, J.

to resort for a remedy to a distant and unknown agent, is to be preferred.

The same conflict of authority exists in respect to the responsibility of the bank for the acts and defaults of a notary employed by it to protest paper which it has received for collection.¹¹

Same—Attorney for Collection.

A similar question is presented when a claim is placed in the hands of an attorney for collection. If the debtor resides at a distant place, the attorney necessarily has authority to employ an attorney or agent at that place, and whether the latter is agent of the first attorney or of the principal is a question of fact, depending upon the understanding of the original parties.¹² Many cases turn upon the construction of receipts, stating in terms that the claim is received "for collection," and such receipts have generally been construed as importing an undertaking to collect, and not merely to transmit to a suitable agent to collect.¹³ The same construction has been placed upon the undertaking of collection and commercial agencies in respect to claims received for collec-

¹¹ That the bank is responsible only for due care in selecting the notary. *Warren Bank v. Bank*, 10 Cush. (Mass.) 582; *Bellemire v. Bank*, 4 Whart. (Pa.) 105, 33 Am. Dec. 46; *Stacy v. Bank*, 12 Wis. 629; *Baldwin v. Bank*, 1 La. Ann. 13, 45 Am. Dec. 72; *Third Nat. Bank v. Bank*, 61 Miss. 112, 48 Am. Rep. 78.

To the same effect, but on the ground that the notary is a public officer whose duties are prescribed by statute. *Britton v. Niccolls*, 104 U. S. 757, 26 L. Ed. 917 (distinguished in *Exchange Nat. Bank v. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722); *First Nat. Bank v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94.

That the bank is responsible for the acts and defaults of the notary. *Ayrault v. Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Davey v. Jones*, 42 N. J. Law, 28, 36 Am. Rep. 505; *Bank of Lindsborg v. Ober*, 81 Kan. 599, 3 Pac. 324.

¹² *National Bank of the Republic v. Bank*, 50 C. C. A. 443, 112 Fed. 726.

¹³ *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665 (citing cases); *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 284.

tion.¹⁴ The receipt may, of course, contain terms requiring a different construction.¹⁵

¹⁴ *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 665; *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274; *Dale v. Hepburn*, 11 Misc. Rep. 286, 32 N. Y. Supp. 269.

¹⁵ *Sanger v. Dun*, 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789.

A mercantile agency which contracts with its subscribers to communicate on request information as to the responsibility of merchants throughout the United States, stipulating that the information is to be obtained mainly by subagents of the subscribers, whose names are not to be disclosed, and that the correctness of information is not guaranteed, is not liable for loss occasioned to a subscriber by the willful and fraudulent act of a subagent in furnishing false information. *Dun v. Bank*, 7 O. C. A. 152, 58 Fed. 174, 23 L. R. A. 687.

CHAPTER VI.

TERMINATION OF RELATION.

31. Modes of Termination.
32. Termination by Limitation.
33. Termination by Act of Party.
34. Termination by Operation of Law.
35. Notice to Third Person—Estoppel.
36. Irrevocable Authority—Authority Given as Security
37. Authority Coupled with an Interest.
38. Authority to Discharge Liability Incurred by Agent.

MODES OF TERMINATION.

31. The relation of principal and agent may terminate—
- (a) By express or implied limitation;
 - (b) By act of party;
 - (c) By operation of law.

The rules relating to the termination of the relation of principal and agent may be discussed conveniently under the above heads. The fundamental rule is that the continuance of the relation, like its formation, depends upon the will of the parties, although circumstances may arise which terminate it by operation of law.

TERMINATION BY LIMITATION.

32. The relation of principal and agent terminates—
- (a) By expiration of the term, whether a fixed period of time, or a period of time determinable by the occurrence of an event expressly or impliedly limited for the continuance of the relation;
 - (b) If the appointment of the agent is for a particular transaction, upon his completion of that transaction.

The time during which the relation of principal and agent shall continue may be fixed by the express¹ or implied²

§ 32. ¹ *Danby v. Coutts*, 29 Ch. D. 500 (during principal's absence from England); *Gundlach v. Fischer*, 59 Ill. 172.

² *Dickinson v. Litwall*, 4 Camp. 279 (usage that broker's authority expires with day on which he is employed).

terms of the appointment, so that the authority of the agent expires by its own limitation. Thus, the employment may be for a certain period of time or until the happening of an event. Where an agent is employed for a particular transaction, the relation necessarily ceases when the agent has accomplished the purposes of the agency.³ When the relation has been so terminated, the agent is *functus officio*, and can no longer bind his principal,⁴ nor is he any longer precluded from acquiring an adverse interest.⁵

When an agent is employed to perform an act, it is an implied term of the appointment, unless a contrary intention is manifested, that the authority shall cease in the event of the principal himself performing the act or causing it to be otherwise performed.⁶ In such case the authority is de-

³ *Blackburn v. Scholer*, 2 Camp. 341, 343; *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068.

An agent employed to let or sell a house after having let had no authority to sell, and was not entitled to commission on sale. *Gillow v. Aberdare*, 9 T. L. R. 12.

The authority of a solicitor retained to conduct an action ceases with the judgment. *Macbeath v. Ellis*, 4 Bing. 468; *Butler v. Knight*. L. R. 2 Ex. 66.

An auctioneer's authority ceases with sale. *Seton v. Slade*, 7 Ves. 265, 276.

After completion of the transaction, a declaration of the agent is not binding on the principal. *Atlanta Sav. Bank v. Spencer*, 107 Ga. 629, 33 S. E. 878.

⁴ After contract of sale is completed, broker cannot alter terms. *Blackburn v. Scholer*, 2 Camp. 341, 343.

⁵ *Moore v. Stone*, 40 Iowa, 259; *Short v. Millard*, 68 Ill. 292.

⁶ *Ahern v. Baker*, 84 Minn. 98, 24 N. W. 341; *Gilbert v. Holmes*, 64 Ill. 548; *Bissell v. Terry*, 69 Ill. 184; *Walker v. Denison*, 86 Ill. 142; *Kelly v. Brennan*, 55 N. J. Eq. 423, 37 Atl. 137.

The Illinois cases say that there is a revocation by operation of law, the power of the principal over the subject-matter having ceased; but if the agent were entitled to notice, as in case of an exclusive agency to sell, it seems that he might make a binding contract of sale, entitling the purchaser to damages, although the principal had conveyed. "The plaintiff (defendant) had a right to employ several agents, and the act of one in making a sale would preclude the others

terminated by implied limitation, and notice of revocation is not necessary. Thus, where an agent authorized to sell a piece of land effected a sale to A., but in the meantime, without notice to him, the principal had sold the land through another agent, and executed a conveyance to another purchaser, it was held that A. could not maintain an action against the principal for damages for breach of contract.⁷ So the authority of the agent terminates upon the extinction of the subject-matter of the agency, as if the principal authorizes the agent to sell a ship, which is afterwards lost, since it is an implied term or condition of the appointment that the thing with reference to which the authority is to be exercised shall continue to exist.⁸

without any notice, unless the nature of his contract with them required it." *Ahern v. Baker*, *supra*. Cf. *Jones v. Hodgkins*, 61 Me. 480.

Where the treasurer of a town was authorized to borrow to adjust a tax, which was adjusted before he acted, his authority ceased. *Benoit v. Inhabitants of Conway*, 10 Allen (Mass.) 528.

⁷ *Ahern v. Baker*, 84 Minn. 98, 24 N. W. 341.

⁸ Story, Ag. § 499.

Clearly, unless a contrary intention is manifested, a condition is to be implied that the authority shall continue only so long as the ship continues to exist. Quære whether the principal could not confer authority in such terms that he would be bound by a contract of sale made on his behalf notwithstanding that when it was entered into the ship had ceased to exist. A contract for the sale of a thing which, unknown to the parties, has ceased to exist, is void for mutual mistake, but if the seller knew the fact, and the buyer did not, the seller would be bound. The question of the termination of the authority by extinction of the subject-matter is distinct from the question of the discharge of a contract of employment by subsequent impossibility, but in both cases the result depends upon whether the parties must have contemplated the continued existence of the subject-matter as a condition—that is, whether such a condition is to be implied. See *Turner v. Goldsmith* [1891] 1 Q. B. 544; *Anson*, Contr. 324; *Clark*, Contr. 678; *Tiffany*, Sales, 23, 160.

TERMINATION BY ACT OF PARTY.

33. Except where an authority is given to secure an independent benefit, or continuance of the authority is necessary to secure the agent against liability incurred, as explained in sections 36-38, the relation of principal and agent may be terminated at any time by either party, subject to the right which the other may have to recover damages for breach of any contract of employment—

- (a) By revocation of the authority by the principal;
- (b) By renunciation of the appointment by the agent.

Revocation of Authority.

Since the power of one person to act for another depends upon the will of that other, the power to act, if it has been conferred, ceases when the other has manifested his will that it shall cease. It is a rule, therefore, that the principal may revoke the authority of an agent at any time before it is executed, and that when revoked the authority ceases.¹ No subsequent act of the agent is binding upon the principal.² Thus, the authority of an auctioneer may be revoked at any time before the goods are knocked down to a purchaser.³ And, if a broker is authorized to buy or sell, the authority may be revoked at any time before completion of a contract of purchase or of sale, and, if under the statute of frauds a writing is required, even after a verbal contract has been completed.⁴ The principal can revoke the authority although he has agreed to employ the agent for a longer time, and by

§ 33. ¹ *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; *Rees v. Fellow*, 38 C. C. A. 94, 97 Fed. 167; *Blackstone v. Buttermore*, 53 Pa. 266; *Chambers v. Seay*, 73 Ala. 373; *Smith v. Dare*, 89 Md. 47, 42 Atl. 909.

² *Taylor v. Lendley*, 9 East, 49; *Warwick v. Slade*, 11 Camp. 127.

³ *Manser v. Back*, 6 Hare, 443.

A recent English case holds, however, that after land has been bid off the purchaser cannot revoke the auctioneer's authority to sign the memorandum. *Van Praagh v. Everidge* [1902] 2 Ch. 266.

⁴ *Farmer v. Robinson*, 2 Camp. 339, note.

revoking is guilty of a breach of the contract of employment; for the power is distinct from the right to revoke.⁵ The general rule is subject to important exceptions in certain cases where the interest of the agent or of some other person is involved in the continuance of the authority, a subject which will be considered later.⁶

Same—How Effected—Notice.

The authority of an agent can be terminated by revocation by any manifestation of the principal's will that the authority shall cease; in other words, by notice of revocation.⁷ The notice may be express⁸ or implied,⁹ and may be communicated in any manner. Authority conferred by deed may be revoked by parol.¹⁰ A revocation may be implied from any conduct of the principal brought home to the agent which manifests an intention to revoke. Thus, the appointment of another agent to do the same act may be effective as a revocation of the power of the former agent,¹¹ although no such implication would arise unless the exercise of the authority by both were incompatible.¹² So, if the principal disposes of the subject-matter of the agency, as, for example, if he sells property which he has authorized another to sell, a revocation is to be implied.¹³ So, a revocation of authority is to be

⁵ Post, p. 139.

⁶ Post, p. 152.

⁷ Jones v. Hodgkins, 61 Me. 480; Robertson v. Cloud, 47 Miss. 208; Welle v. United States, 7 Ct. Cl. 535.

⁸ Erockshire v. Brookshire, 30 N. C. 74, 47 Am. Dec. 341; Rees v. Pellow, 38 C. C. A. 94, 97 Fed. 167 (letter delivered at agent's office in his absence).

⁹ Copeland v. Insurance Co., 6 Pick. (Mass.) 198; Kelly v. Brennan, 55 N. J. Eq. 423, 37 Atl. 137 (demand for return of written power and surrender thereof); Chennault v. Qulsenberry (Ky.) 57 S. W. 234 (power to convey revoked by conveyance of premises to agent as trustee).

¹⁰ Brookshire v. Brookshire, 30 N. C. 74, 47 Am. Dec. 341.

¹¹ Copeland v. Insurance Co., 6 Pick. (Mass.) 198.

¹² Davol v. Quimby, 11 Allen (Mass.) 208; Enright v. Beaumont, 68 Vt. 249, 35 Atl. 57.

¹³ In Jones v. Hodgkins, 61 Me. 480, where a commission merchant

implied from the dissolution of a partnership¹⁴ or from the severance of a joint interest.¹⁵

Same—Notice to Third Persons—Estoppel.

From its very nature the revocation of an agency must be made known to the agent. From that time the authority ceases, and the relation of principal and agent is terminated.

It does not follow, of course, that the principal may not still be bound by the acts of the agent; for if the principal has held out the agent as such he will be estopped to deny the agency as against third persons who may deal with the agent without notice that his authority has been revoked.¹⁶ Therefore, if the principal has recognized the authority of an agent in dealings with a third person, so as to create a representation of authority, the latter may rely on the continuance of the implied authority until he has received notice of its revocation; and, if a person has been held out to the public as an agent, third persons may deal with him as such until the principal has given public notice that the general authority is withdrawn.¹⁷ On the other hand, if an agent has been authorized merely to do a particular act, unless the principal has made representation creating an estoppel as

sold and delivered goods intrusted to him for sale before notice of a sale to another buyer by the principal, the agent was not liable to the principal in trover. "Undoubtedly," said Appleton, C. J., "a sale of property in the hands of a commission merchant employed to sell such property is a revocation—is an act revoking the authority given. But so long as it remains unknown to the commission merchant he is not bound by it." See ante, p. 134.

¹⁴ Schlater v. Wimpenny, 75 Pa. 321.

¹⁵ Rowe v. Rand, 111 Ind. 206, 12 N. E. 377.

¹⁶ Ante, p. 34; post, pp. 151, 183.

¹⁷ Anon. v. Harrison, 12 Mod. 932; Trueman v. Loder, 11 Ad. & E. 589; Pole v. Leask, 33 L. J. Ch. 155; Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339; Southern Life Ins. Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653; Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Fellows v. Steamboat Co., 38 Conn. 197; McNeilly v. Insurance Co., 66 N. Y. 23; Lamothe v. Dock Co., 17 Mo. 204; Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808.

against a particular person, notice to the agent is sufficient.¹⁸ Since the liability of the principal to third persons after revocation of the authority rests upon estoppel, express notice of revocation is not requisite to relieve the principal from liability for subsequent acts. An estoppel can exist only in favor of one who has in good faith dealt with the agent in reliance upon his apparent authority, and hence does not arise if the third person had knowledge of facts which gave him reasonable cause to believe that the authority had been withdrawn.¹⁹ Where, however, a statute provides for the record of powers of attorney, such as powers to convey land, and makes the record constructive notice, and provides for the record of instruments of revocation, third persons who are without notice of an unrecorded revocation may rely upon the presumption of continuance of the authority.²⁰

Same—Revocation before Expiration of Term of Employment.

As has been pointed out, the principal can revoke the authority at any time, although he has agreed to employ the agent for a longer time, and by revoking is guilty of a breach of the contract of employment. It is in this sense that it is sometimes said that the power to revoke is distinct from the right to revoke. In other words, while the power to revoke always exists, except in certain exceptional cases,²¹ the principal may bind himself by contract not to exercise the power, and thus incur liability toward the agent in case of revocation, as for the breach of any other contract.²²

A right on the part of the agent to be employed, or a right on the part of the principal to receive the services of

¹⁸ *Watts v. Kavanagh*, 35 Vt. 34.

¹⁹ *Claffin v. Lenheim*, 66 N. Y. 301; *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 300.

²⁰ *Gratz v. Improvement Co.*, 27 C. C. A. 305, 82 Fed. 381, 40 L. R. A. 393.

²¹ *Post*, p. 136.

²² *Coffin v. Landis*, 46 Pa. 426; *Lewis v. Insurance Co.*, 61 Mo. 534; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410; *Green v. Cole*, 127 Mo. 587, 30 S. W. 135.

the agent, can arise only by virtue of a contract of employment conferring such rights. A promise on the part of the principal to employ the agent for a certain time may be express or implied, but no such promise is to be implied from the mere appointment.²³ Ordinarily the obligation to serve and the obligation to employ are correlative, and where the agent has bound himself to serve for a fixed term a corresponding obligation to employ will readily be implied;²⁴ but the parties may contract upon their own terms, and unless the terms are explicit the question turns upon the construction and interpretation of the particular contract.²⁵

A definite term of employment is often to be implied from the fact that the compensation of the agent is measured by the term of service. Thus, if the agent is to be paid an annual salary, the contract will readily be interpreted as con-

²³ *Kirk v. Hartman*, 63 Pa. 97; *Jacobs v. Warfield*, 23 La. Ann. 895.

²⁴ *Lewis v. Insurance Co.*, 61 Mo. 534; *Horn v. Association*, 22 Minn. 233.

²⁵ A. and B. agreed, "in consideration of the services and payments to be mutually rendered," that for seven years, or so long as A. should continue to carry on business at L., A. should be sole agent at L. for sale of B.'s coals. B. was to have control over prices and credits, and if A. could not sell a certain amount per year, or B. could not supply a certain amount, either might, on notice, put an end to the agreement. At the end of four years B. sold the colliery. Held, that A. could not maintain an action for breach of the agreement, since it did not bind B. to keep the colliery or to do more than employ A. as agent for sale of such coals as he sent to L. *Rhodes v. Forward*, 1 App. Cas. 256.

Defendant, a shirt manufacturer, agreed to employ plaintiff, and plaintiff agreed to serve defendant as agent, canvasser, and traveler, the agency to be determinable by either at the end of five years, by notice, and plaintiff to do his utmost to obtain orders and to sell the goods "manufactured or sold" by defendant as should be forwarded or submitted by sample to plaintiff. After two years defendant's factory was burned down, and he did not resume business or further employ plaintiff. Held, that plaintiff could recover for breach of contract, since there was (distinguishing the case from *Rhodes v. Forward*, *supra*) an express promise to employ, and a

templating an employment for a year;²⁶ and where an agent employed for a definite term, as a year or a month, continues to be employed after the expiration of the original term, a renewal of the employment for another equivalent term will, in the absence of anything to indicate a different intention, be presumed.²⁷ But no inflexible rule can be laid down, since the intention of the parties must be gathered from the construction of the contract as a whole.²⁸

Frequently the contract of employment, although for a definite term, provides for its prior termination upon certain contingencies, and in such cases the principal, if he discharges the agent, merely exercises a right and incurs no liability for breach of contract.²⁹ The principal may also discharge the agent without liability for breach of any implied condition in the contract of employment. As we shall see,³⁰ every agent, by entering into the relation, assumes certain

condition that the factory should continue to exist could not be implied. "The contract," said Lindley, L. J., "will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for * * * the plaintiff's employment was not confined to articles manufactured by the defendant." *Turner v. Goldsmith* [1891] 1 Q. B. 544.

²⁶ *Emmens v. Elderton*, 13 C. B. 495; *Norton v. Cowell*, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331; *Horn v. Association*, 22 Minn. 238. But see *Orr v. Ward*, 73 Ill. 318.

²⁷ *Tatterson v. Manufacturing Co.*, 106 Mass. 56; *Sines v. Superintendents*, 58 Mich. 503, 25 N. W. 485; *Alba v. Moriarty*, 36 La. Ann. 680.

²⁸ *Tatterson v. Manufacturing Co.*, 106 Mass. 56; *Franklin Min. Co. v. Harris*, 24 Mich. 115; *Palmer v. Mill Co.*, 32 Mich. 274; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Haney v. Caldwell*, 35 Ark. 156.

²⁹ *Oregon & W. Mortg. Sav. Bank v. Mortgage Co. (C. C.)* 35 Fed. 22; *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718.

³⁰ Post, p. 395.

obligations toward his principal, such as the obligations to obey instructions, and to use reasonable skill, diligence, and care, and to act in good faith, and in every contract of agency it is an implied condition that the agent will perform these obligations. Consequently for a breach of any of these implied conditions the principal may revoke the authority of the agent without incurring liability on that account.⁸¹

Renunciation of Appointment.

Since the relation depends upon the will of both parties, it may be determined at any time by the renunciation of the agent,⁸² subject, as in the case of revocation, to the right of the other party to recover damages for breach of the contract of employment, if such contract exists.⁸³ The intention to renounce must, of course, be communicated to the principal, but it may be implied from the conduct of the agent, as when he abandons the business of the agency, and the principal may then treat the agency as terminated.⁸⁴ If the principal has held out the agent as such, he must, at his peril, notify third persons of the termination of the authority.⁸⁵ The principal is entitled to reasonable notice of renunciation; and although the agent has not bound himself by contract to

⁸¹ *Phoenix Mut. Life Ins. Co. v. Holloway*, 51 Conn. 311, 50 Am. Rep. 21; *Dieringer v. Meyer*, 42 Wis. 311, 24 Am. Rep. 415; *Newman v. Reagan*, 65 Ga. 512; *Ford v. Danks*, 16 La. Ann. 119; *Case v. Jennings*, 17 Tex. 661. See *Edwards v. Levy*, 2 F. & F. 94; *Caldo v. Bruncher*, 4 C. & P. 518. As to the implied obligations of a servant, *Wood, Mast. & S.* (2d Ed.) § 83. See, also, *Id.* §§ 110-120.

⁸² *United States v. Jarvis*, 2 Ware, 278, Fed. Cas. No. 15,468; *Barrows v. Cushway*, 37 Mich. 481. See, also, *First Nat. Bank v. Bissell* (C. C.) 2 McCrary, 73, 4 Fed. 694. On breach of a contract of agency by the principal, the agent is justified in repudiating the agency. *Duffield v. Michaels* (C. C.) 97 Fed. 825.

⁸³ *United States v. Jarvis*, 2 Ware, 278, Fed. Cas. No. 15,468; *White v. Smith*, 6 Lans. (N. Y.) 5; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60, 27 Pac. 238.

⁸⁴ *Stoddart v. Key*, 62 How. Prac. (N. Y.) 137; *Case v. Jennings*, 17 Tex. 661. Cf. *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93.

⁸⁵ *Capen v. Insurance Co.*, 25 N. J. Law, 67, 44 Am. Dec. 412.

serve for a definite time or to complete the business delegated to him, it seems that he will be liable to the principal for any loss that may result from his failure to give reasonable notice.⁸⁶ If the renunciation is not in breach of his contract, the agent will be entitled to compensation and reimbursement as in other cases. His right to compensation where his renunciation is in breach of contract will be considered later.⁸⁷

Termination by Agreement.

Since the relation of principal and agent may be terminated by either party, it may, of course, be terminated by agreement.

TERMINATION BY OPERATION OF LAW.

34. Except where an authority is given to secure an independent benefit or the continuance of the authority is necessary to protect the agent against liabilities incurred, as explained in sections 36-38, the relation of principal and agent is terminated—

- (a) By the death of either party;
- (b) By the insanity of either party;
- (c) At common law, if a *fême sole* is principal, by her marriage; and where the subject of the authority is real estate, in which a husband or wife acquires an interest upon marriage, the authority is revoked, at least to that extent, by marriage of the principal;
- (d) By the bankruptcy of the principal, so far as relates to rights of which he is thereby divested, and by the bankruptcy of the agent, except so far as relates to the performance of formal acts;
- (e) When the principal and agent are in different countries, as a rule, by the outbreak of war between those countries.

Circumstances may occur, after the creation of an agency, which terminate it irrespective of its original limitation or of the act of the parties directed to that end. An agency is

⁸⁶ *United States v. Jarvis*, 2 Ware, 278, Fed. Cas. No. 15,468. *Quære* in the case of a gratuitous agency. See Story, Ag. § 478.

⁸⁷ Post, p. 445.

terminated by the death, insanity, marriage, or bankruptcy of one or the other of the parties, by war, or by a change of law rendering the continuance of the agency unlawful. In these cases the agency may be said to be dissolved, for lack of better term, "by operation of law."¹ Some of these forms of termination—for example, termination by death or bankruptcy of the agent—might perhaps be classed logically under the head of termination by original limitation, but the above classification has been adopted for the sake of convenience.

Death.

The authority of the agent, unless it be coupled with an interest,² is terminated by the death of the principal.³ This results logically from the representative character of the agent, the authority to act necessarily presupposing a principal to be bound. The authority is also terminated by the death of one of two or more joint principals,⁴ or by the death of a partner in case of an agent appointed by a firm.⁵ Moreover, the contract of employment, likewise, if one exists, is terminated, and the agent is not entitled to recover damages

§ 34. ¹ Under dissolution by operation of law, Story includes all forms of dissolution except by revocation or renunciation. Story, Ag. § 462.

² Post, p. 152.

³ Watson v. King, 4 Camp. 272; Wallace v. Cook, 5 Esp. 46; Blader v. Free, 9 B. & C. 167; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Pacific Bank v. Hannah, 32 C. C. A. 522, 90 Fed. 72; Lincoln v. Emerson, 108 Mass. 87; Brown v. Cushman, 173 Mass. 368, 53 N. E. 860; Harper v. Little, 2 Greenl. (Me.) 14, 11 Am. Dec. 25; Davis v. Bank, 46 Vt. 728; Clayton v. Merrett, 52 Miss. 353; Darr v. Darr, 59 Iowa, 81, 12 N. W. 765; Connor v. Parsons (Tex. Civ. App.) 30 S. W. 83; Duckworth v. Orr, 126 N. C. 674, 36 S. E. 150; Tuttle v. Green (Ariz.) 48 Pac. 1009; In re Kern's Estate, 176 Pa. 373, 35 Atl. 231.

⁴ Rowe v. Rand, 111 Ind. 206, 12 N. E. 377. Cf. Tasher v. Shephard, 6 H. & N. 575; Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167.

⁵ Griggs v. Swift, 82 Ga. 392, 9 S. E. 1062, 5 L. R. A. 405, 14 Am. St. Rep. 176. But see Bank of New York v. Vanderhorst, 32 N. Y. 553.

for the failure to employ him for the balance of the term.⁶ The authority terminates from the moment of death, and all subsequent acts of the agent are nullities, although the death was unknown to him and to the third person dealing with him.⁷ "In the case of a revocation, the power continues good against the constituent, till notice is given to the attorney, but the instant the constituent dies the estate belongs to his heirs, or devisees, or creditors; and their rights cannot be divested or impaired by any act performed by the attorney after the death has happened; the attorney then being a stranger to them, and having no control over their property."⁸ Owing to the harshness of this rule, it has not become established without some dissent.⁹ Story was of the opinion that it should not apply where the act to be done may lawfully be done in the sole name of the agent, as in the case of a factor, supercargo, or shipmaster, and that the authority should in those cases be binding upon all the parties in interest.¹⁰ But this exception has not generally prevailed, and the rule is almost universally recognized that, except where the authority is coupled with an interest, the death of the principal works an instantaneous termination of the

⁶ *Baxter v. Burfield*, 2 Str. 1266; *McNaughton v. Moore*, 2 N. O. 189; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578. See *Tasher v. Shepherd*, 6 H. & N. 575.

⁷ *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167; *Weber v. Bridgman*, 113 N. Y. 600, 21 N. E. 985; *Farmers' Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696; *Soltan v. Vulcanite Co.*, 12 Misc. Rep. 131, 33 N. Y. Supp. 77; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648; *Lewis v. Kerr*, 17 Iowa, 73. And see cases cited note 8, *supra*.

⁸ *Harper v. Little*, 2 Greenl. (Me.) 14, 11 Am. Dec. 25, per Mellen, C. J.

⁹ *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76; *Ish v. Crane*, 8 Ohio St. 520; *Id.*, 13 Ohio St. 574; *Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267; *Deweese v. Muff*, 57 Neb. 17, 77 N. W. 361, 42 L. R. A. 789, 73 Am. St. Rep. 488; *Story, Ag. §§ 495-498*; *Wharton, Ag. §§ 102-104*.

¹⁰ *Story, Ag. § 496*.

agency, and consequently that any subsequent act of the agent is inoperative to bind the principal's estate.

The agency is also terminated by the death of the agent.¹¹ The authority is personal to him, and does not vest in his executors or administrators, unless, indeed, the authority is conferred upon them by the terms of the appointment. If, however, the authority is coupled with an interest, it survives.¹² The death of one of two or more joint agents,¹³ or of a member of an agent firm,¹⁴ unless by the terms of the appointment authority is conferred upon the survivors, also terminates the agency. The death of an agent terminates the authority of a subagent,¹⁵ unless the agent was authorized to employ the subagent on the principal's behalf, and thus create privity of contract.¹⁶

Insanity.

Where such a change occurs that the principal can no longer act for himself, the agent whom he has appointed can no longer act for him. Hence, if the principal becomes insane, the authority of the agent is thereby terminated.¹⁷ This

¹¹ *Johnson v. Johnson's Adm'rs*, Wright (Ohio) 594; *Gage v. Allison*, 1 Brev. (S. C.) 495, 2 Am. Dec. 682; *In re Merrick's Estate*, 8 Watts & S. (Pa.) 402. See, also, *Adriance v. Rutherford*, 57 Mich. 170, 23 N. W. 718.

¹² *Harnickell v. Orndorff*, 35 Md. 341; *Collins v. Hopkins*, 7 Iowa. 463; *Merrin v. Lewis*, 90 Ill. 505; *Jones*, Mtg. § 1786.

¹³ *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Salisbury v. Brisbane*, 61 N. Y. 617.

¹⁴ *Martine v. Insurance Co.*, 53 N. Y. 339, 18 Am. Rep. 529.

¹⁵ *Peries v. Aycinena*, 3 Watts & S. (Pa.) 64; *Lehigh Coal & Navigation Co. v. Mohr*, 83 Pa. 228, 24 Am. Rep. 161; *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371.

¹⁶ *Smith v. White*, 5 Dana (Ky.) 376; *Story*, Ag. § 490.

¹⁷ *Drew v. Nunn*, 4 Q. B. D. 661; *Davis v. Lane*, 10 N. H. 156; *Matthleson & Welchers Refining Co. v. McMahon*, 38 N. J. Law, 536; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; *Bunce v. Gallagher*, 5 Blatchf. 431, Fed. Cas. No. 2,138; *Renfro v. City of Waco* (Tex. Civ. App.) 33 S. W. 766.

Contra: *Wallis v. Manhattan Co.*, 2 Hall (N. Y.) 495, so far as it

rule is subject to the usual exception, if the authority is coupled with an interest.¹⁸ And, as has been shown, if the principal has, by word or conduct, represented that an agent is authorized to act in his behalf, he is bound, notwithstanding his subsequent insanity, by an executed contract which a third person, in ignorance of the insanity and in reliance upon the representation, has entered into with the agent.¹⁹ In most jurisdictions the contracts of a person who has been judicially declared insane are void, and in such case the adjudication would doubtless be constructive notice of the termination of authority.²⁰

It is laid down by all text-writers that the insanity of the agent terminates his authority,²¹ but the question does not appear to have been presented to the courts. It seems that

holds that lunacy must be established by inquisition. "I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change has occurred in the condition of the principal: he was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated." *Drew v. Nunn*, supra, per Brett, L. J.

¹⁸ *Davis v. Lane*, 10 N. H. 156; *Matthiesson & Welchers Refining Co. v. McMahon*, 38 N. J. Eq. 536; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150.

¹⁹ Ante, p. 100.

²⁰ Ante, p. 99. See *Huffcut, Ag. § 71*.

In *Motley v. Head*, 43 Vt. 633, it was held that the mere appointment of a guardian would not warrant a holding that the agency was terminated, unless it appeared that the insanity was such as to disqualify from making a valid contract.

²¹ "The case of the insanity of the agent would seem to constitute a natural, nay, a necessary, revocation of his authority; for the principal cannot be presumed to intend that acts done for him and to bind him, shall be done by one who is incompetent to understand, or to transact, the business which he is employed to execute. The exercise of sound judgment and discretion would seem to be required in all such cases, as preliminaries to the due execution of the authority." *Story, Ag. § 487*.

third persons dealing with the agent in good faith, and in reliance upon his apparent authority, if they could not be restored to their former position, would be entitled to protection.²²

Marriage.

At common law the marriage of a feme sole operates to revoke the authority of an agent previously appointed by her.²³ Under the modern statutes conferring upon married women the power of disposing of their property, a married woman may appoint an agent,²⁴ and hence the marriage of a feme sole does not as a rule revoke the authority of her agent.²⁵ But where the joinder of the husband is necessary to a conveyance by a married woman, the power of a feme sole is necessarily revoked by marriage.²⁶ Where by marriage a husband or wife acquires an interest in the other's land, which can be divested only by joining in a conveyance, a power to sell land executed by a single man or woman is necessarily revoked by marriage to the extent of such interest. It has been held in Texas that such a power executed by a single man is revoked entirely by marriage,²⁷ but in Indiana it has been held that such a power might be exercised notwithstanding marriage, subject only to such rights as the law conferred upon the wife.²⁸ It would seem that an authority given as a security, although not technically coupled with an interest, would not be impaired by marriage.

²² Ante, p. 101.

²³ Charnley v. Winstanley, 5 East, 266; McCan v. O'Ferrall, 8 Cl. & F. 30; Judson v. Sierra, 22 Tex. 365; Wamble v. Foote, 2 Dak. 1, 2 N. W. 239. Cf. Eneu v. Clark, 2 Pa. 234, 44 Am. Dec. 191.

²⁴ Ante, p. 101.

²⁵ Reynolds v. Rowley, 2 La. Ann. 800.

²⁶ Ante, p. 101.

²⁷ Henderson v. Ford, 46 Tex. 627.

This must, of course, rest upon the presumed intention of the principal, unless the husband's deed would be totally inoperative without joinder of the wife.

²⁸ Joseph v. Fisher, 122 Ind. 399, 23 N. E. 856.

Bankruptcy.

The bankruptcy of the principal terminates the authority of the agent so far as relates to rights of property of which the principal is divested by the bankruptcy,²⁹ although as to other rights the authority is not affected,³⁰ nor is the authority revoked if it be part of a security or coupled with an interest.³¹ The revocation dates from the act of bankruptcy, provided an adjudication of bankruptcy follows, but the doctrine of relation is not allowed to defeat the rights of an intervening bona fide purchaser, who has no notice of the act of bankruptcy.³²

The bankruptcy of the agent terminates his authority to receive money and do acts of a like nature,³³ but not to do merely formal acts.³⁴ Termination by bankruptcy of the agent appears to be a result of the implied intention of the principal, rather than a necessary consequence of his bankruptcy.

War.

As has already been stated, war terminates all commercial intercourse between the belligerent countries, and hence a citizen of one country cannot appoint an agent in the other.³⁵ For the same reason war as a rule terminates an agency if the principal is a citizen of one country and the agent a citizen of the other.³⁶ A recognized exception to the rule is an

²⁹ *Minett v. Forrester*, 4 Taunt. 541; *Parker v. Smith*, 16 East, 382; *In re Daniels*, 6 Biss. (U. S.) 405, Fed. Cas. No. 3,566; *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46 (assignment for benefit of creditors); *Elwell v. Coon* (N. J. Ch.) 46 Atl. 590 (assignment).

Story, Ag. § 482.

³⁰ *Dixon v. Ewart*, 3 Meriv. 322.

³¹ *Dixon v. Ewart*, 3 Meriv. 322; *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; post, p. 158.

³² *Ex parte Snowball*, L. R. 7 Ch. 534, 548.

³³ *Audenried v. Betteley*, 8 Allen (Mass.) 302.

³⁴ Story, Ag. § 486.

³⁵ Ante, p. 104.

³⁶ *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *Same v. Statham*, 93 U. S. 24, 23 L. Ed. 789; *Ward v. Smith*, 7 Wall. (U. S.) 447, 19 L. Ed. 207; *Howell v. Gordon*, 40 Ga. 302.

agency for collection of debts, where the agent resides in the same country with the debtor. Such an agency is not necessarily and as matter of law terminated, yet in order to subsist it must have the assent of both parties, and the assent of the principal is not to be presumed unless perhaps it is his manifest interest that the agency should continue, in which case it will be presumed unless the contrary be shown; but otherwise assent to the continuance or ratification of the agent's act must be proved. Furthermore, no payment is good or capable of ratification if made with a view of transmitting the funds to the principal during the continuance of the war.³⁷ The exception is not strictly confined to agencies for the collection of debts, but extends to other agencies, the execution of which does not involve commercial intercourse between citizens of the belligerents. Thus, in a recent case in the Supreme Court of the United States it was held that a power of attorney executed by a married woman and her husband, authorizing her brother to sell and convey real estate owned by her in the city of Washington, was not revoked by the Civil War, although her husband became an officer of the Confederate army, and he and she remained within the Confederate lines during the war.³⁸

An authority coupled with an interest is not terminated by

³⁷ *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453, and cases cited note 36, *supra*.

³⁸ *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658. "It is not every agency," said Peckham, J., "that is necessarily revoked by the breaking out of a war. * * * Certain kinds of agencies are undoubtedly revoked. * * * Agents of an insurance company, it is said, would come within that rule. *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. * * * Agents of a life insurance company are undoubtedly engaged in the active business of their principal. Their duty is to receive the premiums for all policies obtained by them, and to transmit such premiums to the home office. * * * It is easy to see that active and continuous business of such a nature could not be carried on during a war where the principal and agent reside in the different countries engaged in such war. * * * Under the circumstances of this case, we think

reason that the principal is within the lines of the enemy;²² nor, on principle, is an authority given as a security thereby terminated.

NOTICE TO THIRD PERSONS—ESTOPPEL.

35. Where a principal has by words or conduct represented that an agent is authorized to act on his behalf, he is bound by the acts of the agent, notwithstanding termination of his authority otherwise than by death, bankruptcy, or marriage of the principal, or by war, with respect to third persons dealing with the agent in good faith in reliance upon such representation, without notice of such termination.¹

It has already been pointed out ² that if the principal has held out an agent as such he will be estopped to deny the agency as against third persons who may deal with the agent in reliance upon the apparent authority, notwithstanding termination of the agency by act of either party. The same result must of course follow notwithstanding termination of the authority by express or implied limitation,³ or even, in some cases, by what has been termed operation of law. No estoppel in favor of third persons can arise if the agency has been terminated by death,⁴ or where it has been terminated by the marriage ⁵ or bankruptcy ⁶ of the principal to the preju-

the attorney in fact had the right to make the conveyance he did. It was not an agency of the class such as was mentioned in *New York Life Ins. Co. v. Davis*. * * * The mere fact of the breaking out of a war does not necessarily and as matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency."

²² *Washington University v. Finch*, 18 Wall. (U. S.) 106, 21 L. Ed. 818; *Jones, Mtg.* § 1800.

§ 35. ¹ Cf. *Bowstead*, Ag. § 134.

² Ante, p. 138.

³ See cases cited ante, p. 134, note 6.

⁴ Except as to the rights of intervening bona fide purchasers before the adjudication. Ante, p. 149.

⁵ Ante, p. 144.

⁶ Ante, p. 148.

dice of the intervening rights of other persons, or where the exercise of the apparent authority would be illegal, as in case of war.⁷ But an estoppel may be created notwithstanding the insanity of the principal,⁸ and, apparently, notwithstanding the insanity⁹ or bankruptcy¹⁰ of the agent.

IRREVOCABLE AUTHORITY—AUTHORITY GIVEN AS SECURITY.

36. Where an authority is given for a valuable consideration, to secure or effect some benefit, independent of the agent's compensation, it is irrevocable by act of the principal (and is not terminated by the death, insanity, marriage, or bankruptcy of either party, or by war).¹

EXCEPTION—DEATH OF PRINCIPAL. An authority which is not coupled with an interest is terminated by the death of the principal.

SAME—AUTHORITY COUPLED WITH AN INTEREST.

37. An authority is "coupled with an interest," as the term is generally used in the United States, when it is vested in one in whom is also vested such an interest or estate in the thing which is the subject of the authority that he can exercise the authority in his own name.

⁷ Ante, p. 149.

⁸ Ante, p. 147.

⁹ Ante, pp. 100, 146.

¹⁰ Ante, p. 149.

§§ 36-38. ¹ The rule that an authority, although given as a security, terminates by the constituent's death, while supported by weight of authority, is based upon highly artificial reasoning. It is submitted that an authority given as a security, although not coupled with an interest, is not terminated by the occurrence of any of the events above enumerated (except the death of the principal), whose occurrence would cause a bare power to terminate by operation of law. Their occurrence might, indeed, often render it difficult or impossible to enforce the security without resort to the courts; but the authority ought not to be held to have terminated because of the difficulty, or even impossibility, of exercising it in the constituent's name.

SAME—AUTHORITY TO DISCHARGE LIABILITY INCURRED BY AGENT.

38. Where an agent is employed to do an act involving personal liability, and is given authority to discharge such liability on behalf of the principal, the authority (it seems) becomes irrevocable, unless the principal otherwise discharges or indemnifies the agent against the liability as soon as it is incurred.*

Irrevocable Authority.

Although, as a rule, the principal may, at his pleasure, revoke the authority of an agent, it is possible for the principal to confer upon the agent or a third person such a right to the continuance of the authority as to render it irrevocable.

If an authority is conferred upon a person, on sufficient consideration, for the purpose of securing or effecting some benefit to him, independent of his compensation as agent, such an authority is irrevocable. The authority, however, does not survive the death of the principal unless it is vested in one in whom is also vested such an interest or estate in the thing which is the subject of the authority that it can be exercised in his own name; in other words, unless the authority is, as the term is employed in the United States, "coupled with an interest." In England, while the rule in respect to irrevocable authorities appears to be substantially the same as in the United States, the term "coupled with an interest" is employed in a different sense, and is applied to any authority in the execution of which the person invested with it has such an interest or right as to make it irrevocable.³ In other words, in England "authority coupled with an interest" is coextensive with "irrevocable authority." It is perhaps owing to the different meaning which is attached to the term "authority coupled with an interest" by different courts that

* Cf. Bowstead, Ag. § 129.

³ Terwilliger v. Railroad Co., 149 N. Y. 86, 43 N. E. 432, per Andrews, C. J.

there is some confusion in the cases in respect to the nature of the right or interest which renders an authority irrevocable.

It must always be borne in mind that, to make the authority irrevocable, the benefit sought to be secured or effected must be something more than the mere advantage or profit which the agent as such will derive from the continuance of the authority. The profit that will accrue to the agent by way of compensation for his services, even if he is to receive a share of the proceeds, as of a sale or collection to be made by him, is not sufficient.⁴ Nor, unless the interest is otherwise sufficient, is an authority irrevocable because it is a term of the contract of employment that it shall be irrevocable.⁵ In such cases the law deems that the agent is sufficiently protected by his right of action for breach of the contract.

Same—Hunt v. Rousmanier

The leading case on the subject of irrevocable authority in the United States is *Hunt v. Rousmanier*.⁶ In that case Hunt loaned money to Rousmanier, who executed his notes

⁴ *Blackstone v. Buttermore*, 53 Pa. 266; *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207; *Oregon & W. Mortg. Sav. Bank v. Mortgage Co. (C. C.)* 35 Fed. 22; *Hall v. Gambrill (C. C.)* 88 Fed. 709; *Chambers v. Seay*, 73 Ala. 372; *Gilbert v. Holmes*, 64 Ill. 548; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325; *Darrow v. St. George*, 8 Colo. 592, 9 Pac. 791; *Ballard v. Insurance Co.*, 119 N. C. 187, 25 S. E. 956.

The fact that the agent was entitled to commissions on rents collected did not create an authority coupled with an interest. *Farmers' Loan & Trust Co. v. Willson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696.

⁵ *Blackstone v. Buttermore*, 53 Pa. 266; *Walker v. Denison*, 86 Ill. 142; *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. 706; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53.

"In order to make an agreement for irrevocability contained in a power to transact business for the benefit of the principal, binding on him, there must be a consideration for it independent of the compensation to be rendered for the services to be performed." *Blackstone v. Buttermore*, *supra*.

⁶ 8 Wheat. 174, 5 L. Ed. 589.

for the amount, and a day or two after executed a power of attorney authorizing Hunt to execute a bill of sale of Rousmanier's interest in a certain vessel to himself or any other person, and to collect any insurance money that might become due in the event of the vessel being lost. The instrument also recited that the power was given for collateral security for payment of the notes, and was to be void on their payment, but that in case of nonpayment Hunt was to pay the notes out of the proceeds, and return the residue. It was held that the power, since it contained no words of conveyance or assignment, was not coupled with an interest, and hence that, although it would have been irrevocable by Rousmanier, it expired on his death.

"It becomes necessary," said Marshall, C. J., "to inquire what is meant by the expression 'a power coupled with an interest.' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it."

While holding that the power in question terminated with the death of the constituent, because it was not coupled with an interest, Chief Justice Marshall was of the opinion that the power could not have been revoked by any act of the principal during his life, drawing a distinction between a

power "coupled with an interest" and a power given as security but without conveyance or assignment of any interest. "Where a letter of attorney forms part of a contract, and is a security for money, or for the performance of any act which is deemed valuable," he said, "it is generally made irrevocable in terms, or, if it is not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of a person making it, and may, in general, be recalled at his will; yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life by any act of his own, have revoked this letter of attorney." The basis of the distinction between a mere authority given as a security, which terminates with the life of the principal, and a power coupled with an interest, which does not so terminate, he found in the doctrine that an authority must be executed in the name of the person who gives it, from which results the legal impossibility of the exercise of the authority after the death of the person in whose name it must be exercised—a result which does not follow if the interest or title in the thing which is the subject of the agency passes with the power, and is vested in the person by whom it is to be exercised, so that in exercising it he acts in his own name. "The power given by the principal is, under such circumstances," says Story, "rather an assent or agreement that the agent may transfer the property vested in him, free from any equities of the principal, than strictly a power to transfer."†

Same—American Rule.

The definition of an "authority coupled with an interest" given by Chief Justice Marshall in *Hunt v. Rousmanier*, and the distinction drawn by him between a power coupled with an interest and a mere power given as a security, have generally, if not universally, been approved in this country. Accordingly it is declared that in order to constitute "an au-

† Story, Ag. § 480.

thority coupled with an interest" the agent must have more than a mere interest by way of security in the exercise of the authority; that he must have an interest in the thing which is the subject of the authority, and not a mere interest in that which is produced by its exercise.⁸ And it is held, on the one hand, that an authority given upon sufficient consideration, for the purpose of securing to or conferring upon the agent some benefit, independent of his compensation—as where an agent is authorized to sell real or personal property⁹ or to collect a claim¹⁰ and apply the proceeds to the payment of a debt, or is authorized to confess judgment—¹¹ is irrevocable by the act of the principal; and, on the other hand, that unless the authority is "coupled with an interest," as above defined, the authority terminates upon the death of the principal,¹² but that if it is coupled with an interest it survives.¹³

⁸ *State v. Walker*, 125 U. S. 839, 8 Sup. Ct. 929, 31 L. Ed. 769; *Stier v. Insurance Co. (C. C.)* 58 Fed. 843; *Johnson R. Signal Co. v. Signal Co. (C. C.)* 59 Fed. 20. And see cases cited in notes 4 and 5, *supra*.

⁹ *Posten v. Rassette*, 5 Cal. 467; *Hutchins v. Hebbard*, 34 N. Y. 27; *Denson v. Thurmond*, 11 Ark. 586; *Gausen v. Morton*, 10 B. & C. 731; *Terwilliger v. Railroad Co.*, 149 N. Y. 86, 43 N. E. 432. *Contra*: *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76.

A power to enter upon and sell and convey land, given for a consideration of \$5, held irrevocable. *Montague v. McCarroll*, 15 Utah, 318, 49 Pac. 418.

¹⁰ *Marzion v. Ploche*, 8 Cal. 522.

¹¹ *Kindig v. March*, 15 Ind. 248.

Otherwise if without consideration, and not as security for a debt. *Evans v. Fearn*, 16 Ala. 689, 50 Am. Dec. 197.

¹² *McGriff v. Porter*, 5 Fla. 373; *Huston v. Cantril*, 11 Leigh (Va.) 136; *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412.

Where to secure a loan the borrower executed an instrument authorizing the lender on default in payment to enter and take away and sell certain slaves, and from the proceeds pay himself, returning the overplus, the power was revoked by the grantor's death. *McGriff v. Porter*, 5 Fla. 373.

¹³ *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412. See *Willingham v. Rushing*, 105 Ga. 72, 31 S. E. 130.

In accordance with this distinction, it has been held that the power of sale in an ordinary mortgage, being coupled with an interest or estate, is not revoked by the death of the mortgagor;¹⁴ but in states where by statute a mortgage is declared to be a mere security for debt, passing no title or estate in the land to the mortgagee, the power of sale has generally been held to be incapable of execution after the death of the mortgagor.¹⁵ An authority which is coupled with an interest is not revoked by the bankruptcy¹⁶ or insanity¹⁷ of the principal, or by war;¹⁸ and it would seem that the result would be the same if the authority were given as a security so as to be irrevocable by act of the principal, although not, strictly speaking, coupled with an interest.¹⁹

Yet, in spite of the almost universal acceptance of *Hunt v. Rousmanier* as a correct statement of the law, it must be conceded that many cases have given a broader interpretation to the term "coupled with an interest" than can be justified by the language or the reasoning of that decision, which

¹⁴ *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Bergen v. Bennett*, 1 Caines, Cas. (N. Y.) 1, 2 Am. Dec. 281; *Berry v. Skinner*, 30 Md. 567; *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104; *Harvey v. Smith*, 179 Mass. 592, 61 N. E. 217 (chattel mortgage); *Jones, Mtg.* § 1792.

"Strictly speaking, a mortgage vests the whole legal estate in the mortgagee. His title to the land is complete as a legal title, and the power of sale is to relieve him of the equities attached to the mortgage." Per Hoar, J., *Varnum v. Meserve*, *supra*.

¹⁵ *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84; *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636. Otherwise when other provisions of statute declare the power to be a trust and part of the security. *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780.

¹⁶ *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476.

Where the owner of shares of stock in a national bank delivered his certificate, together with a power of attorney to transfer the same, to secure his note, the power was coupled with an interest, and was not revoked by the bankruptcy of the constituent *Dickinson v. Bank*, 129 Mass. 279, 37 Am. Rep. 351. See, also, *Crowfoot v. Gurney*, 9 Bing. 372; *ante*, p. 149.

¹⁷ *Berry v. Skinner*, 30 Md. 567; *ante*, p. 146.

¹⁸ *Ante*, p. 150.

¹⁹ *Ante*, p. 158, notes 9-11.

demands that the authority be accompanied by a conveyance or assignment of the legal title.³⁰ Thus, in the leading case of *Knapp v. Alvord*,³¹ where the power authorized the attorney to sell personal property and to apply the proceeds to the payment or security of a note indorsed by himself and another, it was held that the fact that the power was accompanied by a delivery of possession was enough to couple the power with an interest, and that the power survived the death of the constituent. "As the possession of the property was delivered to Meads," said Chancellor Walworth, "in connection with this power to dispose of it for the security and protection of himself and the other indorsers, the property must be considered as pledged to him for that purpose. The power to sell, therefore, was coupled with an interest in the property thus pledged, and survived." Indeed, the reasoning of the chancellor goes far to show that he would have been

³⁰ Where the agent was authorized to sell goods, and out of the proceeds pay liens and other claims, and apply the balance to payment of notes held by him, the authority was not extinguished by the principal's death. *Merry v. Lynch*, 68 Me. 94.

Where an instrument authorized an attorney to collect rents from mortgaged premises, and to apply upon the mortgage, and contained a clause assigning as security the rents under the present or any future lease, the authority was not revoked by death of the grantor. *Kelly v. Bowerman*, 113 Mich. 446, 71 N. W. 836.

An agreement between joint owners of land, providing that either may sell to pay purchase-money notes, and that the legal title, if either dies before the notes are payable, shall vest in the survivor, to sell and dispose of and to pay such notes, is an authority coupled with an interest, which does not terminate on the death of one of the parties. *Carleton v. Hausler*, 20 Tex. Civ. App. 275, 49 S. W. 118.

Where the principal executed an agreement authorizing the agent to collect certain rents, and apply them on the principal's indebtedness, the authority was coupled with an interest, and did not terminate upon the principal's death. *Stephens v. Sessa*, 50 App. Div. 547, 64 N. Y. Supp. 28.

See, also, *Raymond v. Squire*, 11 Johns. (N. Y.) 46; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780.

³¹ 10 Paige (N. Y.) 205, 40 Am. Dec. 241.

willing to rest the decision upon the existence of an equitable lien upon the property, which he was satisfied was created by the clause in the power authorizing the sale of the property, and the application of the proceeds to the payment of the notes secured. And upon principle it is submitted that this view is correct, and that such a power, although containing no words of conveyance or assignment, is properly to be construed in connection with all the circumstances as creating an equitable lien or right enforceable by the courts, even after the death of the constituent.²²

Same—English Rule.

The English decisions appear in the main to be in accord with the decisions in this country, although a different and broader definition is given to the term "authority coupled with an interest." In *Walsh v. Whitcomb*,²³ where an insolvent executed a power of attorney together with a general assignment of all his effects to a creditor, authorizing the attorney to collect all outstanding debts for the benefit of creditors, it was held that the principal could not revoke the power. "There is," said Lord Kenyon, "a difference in cases of powers of attorney; in general they are revocable from their nature, but there are these exceptions: 'Where a power of attorney is part of a security for money, then it is not revocable; where a power of attorney was made to levy a fine, as part of a security, it was held not to be revocable; the principle is applicable in every case where a power of attorney is necessary to effect any security; such is not revocable.'" In *Watson v. King*²⁴ it was held that an authority to sell certain shares of a ship given by a debtor to his creditor terminated upon the constituent's death. The power was not accompa-

²² See *Bowstead*, Ag. § 129.

Cf. *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998.

²³ 2 Esp. 565 (1797).

²⁴ 4 Camp. 272 (1815). See, also, *Lepard v. Vernon*, 2 Ves. & B. 51.

nied by an assignment, and the decision is thus in accord with *Hunt v. Rousmanier*; but it is to be observed that Lord Ellenborough referred to the power as a "power coupled with an interest," saying that as such it was necessarily revoked by the principal's death,²⁵ whereas Chief Justice Marshall, employing the term with a different meaning, would have declared that the power was revoked by the principal's death because it was not coupled with an interest. In *Raleigh v. Anderson*,²⁶ goods having been consigned to a factor for sale with a limit as to the price, he made advances, and afterwards the principal gave him authority to sell at the market price, and to retain the amount of his advances. It was held that the authority was revocable, because there was no consideration for the agreement. In *Gansen v. Morton*²⁷ it was held that a power of attorney executed by a debtor and authorizing his creditor to sell certain lands and to discharge his debt out of the proceeds was coupled with an interest and irrevocable by act of the principal. In *Smart v. Sandars*²⁸ it was held that a factor to whom goods had been consigned for sale did not, by making advances, acquire such an interest as to render the authority irrevocable; while it was said that, if the advances had been made in consideration of an agreement that the authority to sell should not be revoked, it would have been irrevocable. Wilde, C. J., after referring to the cases above cited, said: "The result appears to be that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. That is what is meant by an authority coupled with an

²⁵ "A power, coupled with an interest, cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?" Per Lord Ellenborough, *Watson v. King*, 4 Camp. 272.

²⁶ 6 M. & W. 670 (1830).

²⁷ 10 B. & C. 731 (1830).

²⁸ 5 C. B. 895 (1848).

interest, and which is commonly said to be irrevocable." This rule has been approved by later cases.²⁰

It is to be observed that, in spite of the different use of the term "authority coupled with an interest," the rule declared by Wilde, C. J., differs little, if at all, from that declared by Marshall, C. J., when he said that "where a letter of attorney forms part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it * * * is deemed irrevocable in law."²⁰ Whether such an authority, if not accompanied by the conveyance or assignment of an interest in the thing, is revoked by the death of the principal does not appear to have been considered in any English case since *Watson v. King*.²¹

Same—Authority for Benefit of Third Person.

It is not necessary, in order to render an authority irrevocable, that it be vested in the person to be benefited by its exercise, but the beneficiary may be a third person.²² Thus, where a debtor authorizes another to sell property and

²⁰ *De Comas v. Prost*, 3 Moore, P. C. (N. S.) 158; *Clerk v. Laurie*, 2 H. & N. 199.

P. promoted a company for the purpose of purchasing from him and working a mining property. C. signed an underwriting letter addressed to P., by which he agreed, in consideration of a commission, to subscribe for 1,000 shares in the company, and that the agreement and application should be irrevocable, and, notwithstanding any repudiation by him, should be sufficient to authorize P. to apply for the shares on behalf of C., and the company to allot them. P., by letter, accepted the terms. Subsequently C. wrote to P., and to the company, repudiating the agreement; but P. applied on behalf of C. for the shares, and the company allotted them, and placed C.'s name on the register. Held, that C. was not entitled to have his name removed, since the authority was coupled with an interest, and therefore not revocable. *Lopes, L. J.*, said: "The object was to enable Mr. Phillips, the vendor, to obtain his purchase money, and * * * it therefore conferred a benefit on the donee of the authority." *Hannan's Empress Gold Mining & D. Co.* [1896] 2 Ch. 643.

²⁰ Ante, p. 156.

²¹ Supra. See *Bowstead*, Ag. 322.

²² *Walsh v. Whitcomb*, 2 Esp. 565; *Kindig v. March*, 15 Ind. 248 (warrant of attorney to confer judgment).

to pay the proceeds to a creditor, the authority becomes irrevocable upon the creditor's acceptance of the security.⁸³ If the authority is accompanied by a conveyance or assignment of an interest, the authority is not revoked by the principal's death.⁸⁴ So, if a debtor, having funds in the hands of an agent, authorizes him to pay the debtor's creditor, and the agent promises the creditor to pay him or to hold the funds to his use, the principal can no longer revoke the authority, nor would it be revoked by his death.⁸⁵

Same—Authority to Discharge Liability Incurred by Agent.

While an authority conferred for the benefit of the principal, and not as a means of securing some benefit to the agent, is ordinarily revocable,⁸⁶ it seems that an authority may become irrevocable if its continuance is necessary to secure the agent against liability already incurred in favor of a third person. It is true that the principal must indemnify the agent for any loss sustained or liability incurred in the course of the agency, and this is ordinarily the agent's sole protection or security.⁸⁷ But if an agent is employed to do an act involving personal liability, and is given authority to discharge the liability on behalf of the principal, it would be manifestly unjust to permit the principal to revoke the authority after the liability has been incurred, at least without fully indemnifying the agent. For example, if an agent is

⁸³ *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998.

⁸⁴ *Hunt v. Rousmanler*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589.

Where a deed or a power of attorney executed by a member of an underwriters' association authorized the agent to adjust and pay losses, and provided for a deposit of money by the members with the agent, which was a trust fund for protection of the insured, the power was coupled with an interest, and was not revoked by death of a member as to losses under policies issued during his lifetime. *Durbrow v. Eppens*, 65 N. J. Law, 10, 46 Atl. 582.

⁸⁵ *Crowfoot v. Gurney*, 9 Bing. 372; *Hodgson v. Anderson*, 3 B. & C. 842; *Goodwin v. Bowden*, 54 Me. 425; *Simonton v. Bank*, 24 Minn. 216; ante, p. 379.

⁸⁶ Ante, p. 136.

⁸⁷ Post, p. 456.

authorized to make a contract in his own name, and to discharge it out of moneys of the principal in his hands, it seems that the authority to use the funds for that purpose becomes irrevocable as soon as the contract has been entered into, provided that the principal does not himself discharge the contract or provide other funds, or at least secure the agent against loss. Perhaps there is no decision which directly sustains this proposition,²² but its soundness has been approved by high authority.²³

²² See *Read v. Anderson*, 10 Q. B. D. 100, affirmed 13 Q. B. D. 781; *Hess v. Rau*, 95 N. Y. 359, affirming 17 J. D. S. 324. Cf. *Seymour v. Bridge*, 14 Q. B. D. 460; *Perry v. Barnett*, 15 Q. B. Div. 460; *Tatam v. Reeve* [1893] 1 Q. B. 44; *Anson*, Contr. 359.

In *Read v. Anderson*, *supra*, it was held that a turf commission agent could recover the amount of bets made by him in his own name at the request of and for defendant, and paid by the plaintiff to the winners, although defendant had directed him not to pay. The trial judge took the view that the agent's authority to pay the bets if lost was a security against any loss which might result from the personal obligation to pay the bets, and was thus coupled with an interest, and that it was immaterial that the obligation was not legally enforceable, since its nonfulfillment would injure the plaintiff's business. It was said that the case might be supported on the ground that the principal was bound to indemnify the agent against the consequences of the act. The judgment was affirmed by the court of appeal apparently on the second ground. "The plaintiff," said Bowen, Jr., "has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue, in the ordinary course of his business, from this step."

It is true that where a debtor, having funds in the hands of an agent, authorizes him to pay a creditor, and the agent promises the creditor to pay, the authority is irrevocable, but in that case the creditor acquires an irrevocable right with respect to the funds. *Crowfoot v. Gurney*, 9 Bing. 372; *Hodgson v. Anderson*, 3 B. & C. 842; *Goodwin v. Bowden*, 54 Me. 425; *Simonton v. Bank*, 24 Minn. 216.

²³ "If a principal employs an agent to perform an act, and if upon revocation of the authority the agent will be by law exposed to loss or suffering, the authority cannot be revoked. But in the present

case no claim could be lawfully enforced against the agent." Per Brett, M. R., dissenting, *Read v. Anderson*, 10 Q. B. Div. 100.

"There is a qualification of the rule where the agent has entered upon the execution of the authority before revocation, and has so bound himself that a retraction of the authority would subject him to liability. In such cases the principal cannot revoke the authority as to the part of the transaction remaining unexecuted, at least not without indemnifying the agent." Per Andrews, C. J., in *Terwilliger v. Railroad Co.*, 149 N. Y. 86, 43 N. E. 432.

See Story, Ag. §§ 446, 447; Hufcut, Ag. (2d Ed.) 87, 89; Bowstead, Dig. Ag. 321.

CHAPTER VII.

CONSTRUCTION OF AUTHORITY.

- 39. Express Authority—Power of Attorney.
- 40. Informal Authority.
- 41. Ambiguous Authority.
- 42. Implied Authority.
- 43. Express Authority—Incidental Powers Implied.
- 44. Powers Implied from Usage.

In General.

In the preceding chapters we have considered how the relation of principal and agent may be created, and also some other matters closely connected with that question. We have seen that in what may be called the normal type of agency the relation is created by the principal's appointment or prior authorization of the agent to act for him in bringing him into legal relations with third persons. When the relation of principal and agent is thus established, the act of the agent, pursuant to the authority conferred upon him, is the act of the principal, and as between the principal and third persons, with whom the agent deals, the same rights and obligations ordinarily result as if the principal dealt in person.¹ The power of the agent, indeed, under these circumstances, to subject his principal to liabilities in favor of third persons, is not confined to cases in which the acts of the agent are done pursuant to the authority actually conferred; for, as we shall see,² the principal may be bound if the agent acts in excess of his actual authority, provided he acts within his so-called "apparent" or "ostensible" authority. In very many cases, however, no question of "apparent" authority is involved, and the rights and obligations which arise between the principal and third persons depend solely upon the actual authority of the agent.

¹ Post, p. 182.

² Post, p. 180 et seq.

Again, when the relation of principal and agent has once become established, certain rights and obligations arise as between principal and agent.³ It is the duty of the agent to conform strictly to the authority actually conferred upon him. Any departure on his part from the terms of his authority is a breach of his implied undertaking to obey the instructions of his principal, rendering him liable to respond in damages for any resulting loss, and in many cases working a total forfeiture of his right to remuneration, reimbursement, or indemnity.⁴

Finally, the rights and obligations arising between the agent and third persons with whom he deals may depend upon the authority actually conferred upon him.⁵

It is important, therefore, before entering in detail upon a consideration of the respective rights of the various sets of parties, to consider the nature and extent of the actual authority conferred upon the agent by appointment. The object in each case is to ascertain the intention of the principal as expressed by him, or to be inferred from his conduct, interpreted in the light of the surrounding circumstances. The question is therefore one of construction or interpretation. The rules applicable are in the main similar to those which apply to the construction and interpretation of contracts.

EXPRESS AUTHORITY—POWER OF ATTORNEY.

39. A formal power of attorney is strictly construed, as giving only such authority as it confers expressly or by necessary implication. Therefore—

- (1) The operative part of the power is controlled by the recitals;**
- (2) Where authority to do particular acts is followed by general words, they are construed as enlarging the authority only so far as necessary to accomplish the particular acts.**

³ Post, pp. 395, 439. ⁴ Post, pp. 396, 454. ⁵ Post, pp. 330-394.

SAME—INFORMAL AUTHORITY.

40. Where authority is expressly conferred upon an agent otherwise than by formal power of attorney, the authority is construed liberally, with a view to accomplishing the object of the authority and in the light of the usages of business.

SAME—AMBIGUOUS AUTHORITY.

41. Where authority is conferred in such terms as to be capable of more than one construction, an act done by the agent, in good faith, which is warranted by one construction, is deemed to have been authorized, although that construction was not intended by the principal.

Power of Attorney.

A formal power of attorney must be strictly construed. To bring an act within the authority conferred, it must appear, on a fair construction of the whole writing, that the authority is to be found within the four corners of the instrument, either by express terms or necessary implication.¹ For example, a power to confess judgment at a specified term of court does not confer authority to confess judgment at a later term;² a power to "negotiate, make sale, dispose of, assign, and transfer" promissory notes does not include power to pledge;³ and it has even been held that a power

§§ 30-41. ¹ *Attwood v. Munnings*, 7 B. & C. 278; *Withington v. Herring*, 5 Bing. 442, 438; *Bryant v. La Banque du People* [1893] A. C. 170; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Brantley v. Insurance Co.*, 53 Ala. 554; *Gilbert v. How*, 45 Minn. 121, 47 N. W. 643, 22 Am. St. Rep. 724.

² *Rankin v. Eakin*, 3 Head (Tenn.) 229.

³ *Jommenjoy Coondoo v. Watson*, 9 App. Cas. 561.

It is not necessary to invoke the rule of strict construction to hold that power to sell real estate does not include power to mortgage. *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Jeffrey v. Hursh*, 49 Mich. 31, 12 N. W. 898; *Morris v. Watson*, 15 Minn. 212 (Gil. 165).

to sell real estate does not cover land subsequently acquired by the constituent.⁴ Authority to act in the name of the principal, unless a contrary intention appears, confers authority to act only in his individual business, and for his personal benefit.⁵ Thus, a power authorizing an agent to execute or indorse bills or notes in the name of the principal does not authorize their execution or indorsement for the agent's own benefit⁶ or for the accommodation of a stranger;⁷ nor will separate powers given to one agent by two persons, authorizing him to execute and indorse notes in their names, respectively, authorize him to make a joint note in the name of both principals.⁸

On the other hand, "the object of the parties is to be kept in view, and when the language used will permit that construction should be adopted which will carry out instead of defeating the purpose of the appointment."⁹ For this rea-

⁴ *Penfold v. Warner*, 96 Mich. 179, 55 N. W. 680, 35 Am. St. Rep. 591. See, also, *Weare v. Williams*, 85 Iowa, 253, 52 N. W. 328. But see *Fay v. Winchester*, 4 Metc. (Mass.) 513; *Bigelow v. Livingston*, 28 Minn. 57, 9 N. W. 81; *Benschoter v. Lack*, 24 Neb. 251, 38 N. W. 746.

⁵ *Attwood v. Munnings*, 7 B. & C. 278; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Adams Exp. Co. v. Trego*, 35 Md. 47; *Harris v. Johnston*, 54 Minn. 177, 55 N. W. 970, 40 Am. St. Rep. 312; *Wilson v. Wilson-Rogers*, 181 Pa. 80, 37 Atl. 117.

⁶ *Stalner v. Tysen*, 3 Hill (N. Y.) 279; *Camden Safe Deposit & Trust Co. v. Abbott*, 44 N. J. Law, 257; *Stainback v. Bank*, 11 Grat. (Va.) 269.

⁷ *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *St. John v. Redmond*, 9 Port. (Ala.) 428; *Wallace v. Bank*, 1 Ala. 565.

⁸ *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

Where each of several tenants in common executed a separate power authorizing the attorney to sell and convey the constituent's interest in the land, and "to sell and indorse any promissory notes that may be taken and secured by mortgage" on the land, the power did not authorize the attorney to bind his principal as indorser, jointly with the other tenants, of a note taken payable jointly to all. *Harris v. Johnston*, 54 Minn. 177, 55 N. W. 970, 40 Am. St. Rep. 312.

⁹ *Holladay v. Daily*, 19 Wall. (U. S.) 606, 22 L. Ed. 187, per Field, J. See, also, *Hemstreet v. Burdick*, 90 Ill. 444.

son, with formal powers as well as with informal powers, the grant of authority must be construed to include all medium powers which are necessary to the effective execution of the authority expressly granted,¹⁰ and evidence of usage is admissible for the purpose of interpreting the authority.¹¹ Thus, a power to convey has frequently been held to be implied in a power to sell real estate, as necessarily incident to its effectual execution;¹² and a power to convey has been held to include by implication power to convey with general warranty, where a general warranty is a common and usual mode of assurance on the sale of real estate.¹³

In questions of construction, precedents and even rules are of comparatively little value, since each case must turn upon the language of the particular instrument. One or two rules, however, offer practical guidance in the construction of powers.¹⁴ (1) The grant of authority is controlled by the recitals. Thus, where a power recited that the constituent was going abroad, and the operative part gave authority in general terms, it was held that the authority was limited to the principal's sojourn abroad.¹⁵ (2) Where authority to do particular acts is followed by general words, the general words are restricted to what is necessary for the performance of the particular acts, and are to be construed as enlarging the authority granted only when necessary to

¹⁰ *Howard v. Baillie*, 2 H. Bl. 618; *Witherington v. Herring*, 5 Bing. 442; *LeRoy v. Beard*, 8 How. (U. S.) 451, 12 L. Ed. 1151; post, p. 174.

¹¹ Post, p. 174.

¹² *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Hemstreet v. Burdick*, 90 Ill. 444; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59.

¹³ *Schultz v. Griffin*, 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825. See, also, *Leroy v. Beard*, 8 How. (U. S.) 451, 12 L. Ed. 1151; *Taggart v. Stanbery*, 2 McLean (U. S.) 543, Fed. Cas. No. 13,724; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92.

¹⁴ See *Bowstead*, Dig. Ag. art. 33.

¹⁵ *Danby v. Coutts*, 29 Ch. D. 500.

effectuate the purpose for which the authority is given.¹⁶ Thus, under a power to demand and receive all moneys due and "to transact all business," the words "all business" were construed to mean all business necessary for the recovery of the moneys, and hence it was held that the power did not confer authority to indorse a bill of exchange received by the agent under the power.¹⁷ And generally, where the authority to do particular acts is followed by a broad grant of authority, "to do all other acts which the principal could do in person," "to transact all business," and like phrases, the particular authority granted will be taken as indicating the true purpose of the agency, and the general authority will be construed as enlarging the particular authority only so far as necessary to accomplish that purpose.¹⁸ Indeed, this rule applies with much the same force, if less frequently, to cases where the authority is conferred orally.¹⁹

Same—Parol Evidence.

Where authority is conferred by written instrument, the authority cannot be enlarged or varied by parol evidence.²⁰ This rule applies, of course, only when the parol evidence is offered to contradict or vary the terms of a writing from which the authority is solely derived. Parol evidence of a subsequent grant of authority, enlarging or varying the authority previously granted, is admissible, provided that the

¹⁶ *Attwood v. Munnings*, 7 B. & C. 278; *Harper v. Goodsell*, L. R. 5 Q. B. 422; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Pollock v. Cohen*, 32 Ohio St. 514.

¹⁷ *Hay v. Goldschmidt*, stated in *Hogg v. Snalith*, 1 Taunt. 347.

¹⁸ *Esdalle v. La Nanse*, 1 Y. & C. 394; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Billings v. Morrow*, 7 Cal. 172, 68 Am. Dec. 235.

¹⁹ *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

²⁰ *Gardner v. Baillie*, 6 T. R. 591; *Clafin v. Continental Jersey Works*, 85 Ga. 27, 11 S. E. 721; *Pollock v. Cohen*, 32 Ohio St. 514; *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 813; *Allis v. Goldsmith*, 22 Minn. 123.

authority is not of a kind that must be conferred by writing.²¹ Thus, the parol evidence rule excludes evidence of usage or custom, when such evidence is offered to enlarge or to vary the express terms of a written authority.²² Evidence of usage may, however, be admitted to interpret the authority, since even a formal power is to be construed as conferring by implication powers reasonably necessary for its effectual execution, and hence as including in such cases customary and usual powers.²³

Informal Authority.

Where the authority is conferred by writing not under seal, a more liberal construction will generally obtain.²⁴ The strict construction of powers under seal, however, does not rest upon the mere presence of the seal, but upon their formal character, and upon the fact that the grant of authority is carefully guarded; and an equally strict construction must obtain, in spite of the absence of a seal, if the instrument appears to be drawn with exactness and precision.²⁵ Commercial instruments, such as orders and letters of instruction, are generally construed with greater liberality, because they are generally drawn in a loose and inartificial manner, and leave much for inference and implication.²⁶ A fortiori the same liberal construction ordinarily prevails where the grant of authority is oral. Nevertheless, in every case, the question is one of intention, and if the intention is

²¹ *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Williams v. Cochran*, 7 Rich. Law (S. C.) 45; *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. 340; *Story, Ag. §§ 79, 80*.

²² *Hogg v. Snailth*, 1 Taunt. 347; *Delafield v. State of Illinois*, 26 Wend. (N. Y.) 192.

²³ *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Reese v. Medlock*, 27 Tex. 123, 84 Am. Dec. 611; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Story, Ag. §§ 76, 77*; ante, p. 169.

²⁴ See *Pole v. Leask*, 28 Beav. 562, 29 L. J. Ch. 888; *Enthwistle v. Dent*, 1 Ex. 812; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

²⁵ See *Kilgour v. Finlyson*, 1 H. Bl. 156.

²⁶ *Story, Ag. § 75*.

clearly expressed, at least as between principal and agent, the authority must be strictly pursued.²⁷

Ambiguous Authority.

Where authority is conferred in such terms as to be fairly susceptible of one or more constructions, and one of them is in good faith adopted and acted upon by the agent, it is not competent for the principal to repudiate the act as unauthorized because the construction adopted was not intended by him. The principal must bear the consequences if the departure from his intention was due to his failure to give his instructions in clear and unambiguous terms.²⁸ Obviously, this rule can have little application to formal powers, which are subject to strict construction.²⁹

²⁷ *Bertram v. Godfray*, 1 Knapp, 381; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

Where an agent authorized by letter to sell land at a fixed price, in case he could sell immediately, wrote that he could not sell at that price, and requested authority to sell for less, or else to let the matter drop, and afterwards, without further communication, sold for the price first fixed, it was held that the sale was unauthorized. *Matthews v. Sowle*, 12 Neb. 398, 11 N. W. 857.

²⁸ *Ireland v. Livingstone*, L. R. 5 H. L. 395; *Le Roy v. Beard*, 8 How. (U. S.) 451, 468, 12 L. Ed. 1151; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; *Winne v. Insurance Co.*, 91 N. Y. 185; *Bessent v. Harris*, 63 N. C. 542; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67, 21 N. W. 184; post, p. 404.

²⁹ "They [formal powers] are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions, which are interpreted most strongly against the writer, especially where they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations." *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150. But see *Le Roy v. Beard*, 8 How. (U. S.) 451, 12 L. Ed. 1151.

IMPLIED AUTHORITY.

42. Where an agency is established by implication from the adoption by the principal of acts unauthorized, the scope of the authority is strictly limited to acts similar to those adopted.

EXPRESS AUTHORITY—INCIDENTAL POWERS IMPLIED.

43. Every agent in the execution of his express authority has implied authority to do whatever is reasonably necessary to its effective execution, unless the principal has indicated a contrary intention.

SAME—POWERS IMPLIED FROM USAGE.

44. Every agent in the execution of his express authority has implied authority to act in accordance with the established usages and customs of the particular business which he is employed to transact, or of the particular agency in which he is employed, unless his principal has indicated a contrary intention.

It has already been pointed out that the appointment of an agent may be implied as well as express, and that authority to act as agent will be implied whenever the conduct of the principal is such as to manifest an intention to confer it.¹ Most frequently an implied agency arises from the principal's adoption of unauthorized acts, such conduct readily giving rise to the inference that he desires the agent to perform other acts of the same kind, and thus being strong, if not conclusive, evidence of actual authority to perform other like acts. It follows that when authority is conferred in this manner by implication it can be no broader than the inference warrants, and must be strictly limited to acts similar to those previously adopted.² The same evidence which may thus establish an implied agency may establish an agen-

§§ 42-44. ¹ Ante, p. 32.

² Ante, p. 33.

cy by estoppel in favor of one subsequently dealing with the agent, if he was a party to the former course of dealing, and dealt with the agent in reliance upon the representation of authority created by the principal's adoption of the former acts.³ Here, also, the agency by estoppel can be no broader than the representation, and must be limited to acts similar to those adopted.

Incidental Powers.

Authority to accomplish a particular end necessarily includes authority to employ reasonable means to its accomplishment, unless such means be expressly excluded.⁴ As we have seen, even a formal power of attorney is construed as conferring medium powers necessary for its effective execution.⁵ The rule is necessarily very general. What is reasonably necessary must, of course, depend upon the object sought to be accomplished and the circumstances of the particular case. It is not easy, indeed, to draw a line between the powers which are implied from usage and custom⁶ and those which are implied as necessarily incident to the effective execution of the authority conferred. The general application of the rule will be seen from the illustrations given.

Thus, an agent authorized to receive and sell certain goods, and to pay himself a debt out of the proceeds, has authority to bring an action against a person wrongfully withholding possession.⁷ An agent authorized to enter into a binding contract has authority to sign a memorandum to satisfy the statute of frauds.⁸ An agent employed to find a purchaser for property has authority to describe it to an intending pur-

³ Ante, p. 86.

⁴ *Pole v. Leask*, 28 Beav. 562, 29 L. J. Ch. 888; *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Sprague v. Gillett*, 9 Metc. (Mass.) 91; *Peck v. Harriott*, 6 Serg. & R. (Pa.) 146, 9 Am. Dec. 415; *Williams v. Getty*, 81 Pa. 461, 72 Am. Dec. 757; *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *National Bank v. Bank*, 50 C. C. A. 443; 112 Fed. 726.

⁵ Ante, p. 170.

⁶ Post, p. 177.

⁷ *Curtis v. Barclay*, 7 D. & R. 539.

⁸ *Durrell v. Evans*, 1 H. & C. 174.

chaser and to make representations as to facts affecting its value; ⁹ but an agent employed to find a purchaser and contract for the sale of real estate has not authority to receive the purchase money.¹⁰ An agent authorized to secure immediate possession of a storeroom may bind his principal by a contract to pay a bonus therefor, if it cannot be otherwise obtained.¹¹ An attorney employed by one of the parties to an arbitration to pay the amount awarded against him, and directed to do whatever is needful in the matter, has power to execute a release required by the award.¹² An agent sent to hurry forward goods, and instructed to see that there is no delay in shipping them, has authority to bind his principal by a contract to pay wharfage due on the goods, in order to release them from a claim of lien under which they are held.¹³ An agent authorized to open a new channel for the purpose of turning the course of a stream has implied authority to erect a dam or breakwater across the old channel to expedite the work.¹⁴ An agent employed to obtain subscriptions to an agreement to form a joint-stock company to control certain lands has authority to make representations as to the location and quality of such lands.¹⁵ An agent employed to travel about the country and sell goods has implied authority to hire a horse to enable him to get from place to place; or, at least, in such case an inference or implication of authority arises sufficient to justify a finding of

⁹ *Mullins v. Miller*, 22 Ch. D. 194.

¹⁰ *Mynn v. Joliffe*, 1 M. & Rob. 326.

¹¹ *Shackman v. Little*, 87 Ind. 181.

¹² *Dawson v. Lawley*, 4 Esp. 65.

¹³ *Robinson v. Iron Co.*, 39 Hun (N. Y.) 634.

Where goods shipped to an agent, to be by him reshipped and sold in a foreign market, were held under a claim of general average resulting from an accident to the vessel, it was held that he had authority to execute a general average bond in order to secure possession of the goods, and thus carry out the object of his agency. *Hardee v. Hall*, 12 Bush (Ky.) 327.

¹⁴ *Barns v. City of Hannibal*, 71 Mo. 449.

¹⁵ *Sandford v. Handy*, 23 Wend. (N. Y.) 260.

fact that such authority is conferred upon the agent.¹⁶ Indeed, it is perhaps overstating the case in some other of the foregoing illustrations to affirm that as matter of law the agent had the authority attributed to him, the question whether the means employed was reasonably necessary being often a mere question of fact, dependent upon the circumstances of the particular case.¹⁷

Usages of Particular Business.

The authority of an agent is to be construed in the light of the established usages and customs of the business in which he is employed. Where one person employs another to transact business for him, it is reasonable to infer that he intends the agent to transact the business according to the recognized usages and customs of the particular business or of the place in which it is to be transacted; and hence, in the absence of any indication of a contrary intention, authority to act in accordance with any such usage or custom will be implied.¹⁸ In order that any particular usage may be thus read into the authority, it must be established; that is, it must be so general that it is generally known, and will hence be presumed to be known by the principal, although it is not essential that it be actually known to him.¹⁹ If it is not established, it must appear that it was known to

¹⁶ *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516. See, also, *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827.

¹⁷ *Story*, Ag. § 110.

¹⁸ *Sutton v. Tatham*, 10 Ad. & E. 27; *Pollock v. Stables*, 12 Q. B. 765; *Pelham v. Hilder* (1841) 1 Y. & C. 3; *Upton v. County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Sumner v. Stewart*, 69 Pa. 321; *Kraft v. Fancher*, 44 Md. 204; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876.

¹⁹ *Sutton v. Tatham*, 10 Ad. & E. 27; *Pollock v. Stables*, 12 Q. B. 765; *Guesnard v. Railroad Co.*, 76 Ala. 453; *Bailey v. Bensley*, 87 Ill. 556; *Hilbard v. Peek*, 75 Wis. 619, 44 N. W. 641; *Milwaukee & W. Inv. Co. v. Johnston*, 35 Neb. 554, 53 N. W. 475. As to requisites of usage, see *Clark*, Contr. 482.

him.²⁰ The usage must be legal; that is, it must not be in conflict with positive law.²¹ It must be reasonable.²² Evidence of usage cannot be admitted to change the intrinsic character of the agency,²³ and, of course, usage can never override the positive instructions of the principal.²⁴ Illustrations of the part played by usage and custom in interpreting the authority expressly conferred upon agents could be multiplied indefinitely. For example, in the absence of express limitation of his authority, an agent employed to sell has implied authority to sell with customary warranty,²⁵ and to sell on credit, if it is customary in such sales to sell on credit.²⁶ A broker who is employed to transact business at a certain place has implied authority to act in accordance with the reasonable usages of that place,²⁷ and, if he is a member of the stock exchange, has implied authority to buy and sell, and generally to govern himself, according to the usages of the stock exchange.²⁸ Other illustrations will

²⁰ *Robinson v. Mollett*, L. R. 7 H. L. 802; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573; *Byrne v. Packing Co.*, 137 Mass. 313.

²¹ *Day v. Holmes*, 103 Mass. 306; *Evans v. Wain*, 71 Pa. 69.

²² *Robinson v. Mollett*, L. R. 7 H. L. 802; *Sweeting v. Pearce*, 7 C. B. (N. S.) 449; *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762.

²³ *Robinson v. Mollett*, L. R. 7 H. L. 802; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573 (usage authorizing factor to pledge).

²⁴ *Barksdale v. Brown*, 1 Nott. & M. 517; *Hall v. Storrs*, 7 Wis. 253.

²⁵ *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Upton v. County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Smith v. Tracy*, 36 N. Y. 82; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876; post, p. 207.

²⁶ *Pelham v. Hilder*, 1 Y. & C. 3.

²⁷ *Pollock v. Stables*, 12 Q. B. 765; *Cropper v. Cook*, L. R. 3 C. P. 199; *Bailey v. Bensley*, 87 Ill. 556.

²⁸ *Young v. Cole*, 3 Bing. N. C. 724; *Coles v. Bristow*, L. R. 4 Ch. 3; *Nickalls v. Merry*, L. R. 7 H. L. 530; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Skiff v. Stoddard*, 63 Conn. 198, 28 Atl. 874, 28 Atl. 104, 21 L. R. A. 102.

be given in discussing the scope of various particular authorities.²⁰

Usages of Particular Agencies.

There exist various classes of agents, such as factors, brokers, auctioneers, and attorneys at law, who hold themselves out as ready to serve the public generally, and who may be termed professional agents. Because they are customarily invested with certain powers, and charged with certain duties, usages and customs defining their powers have grown up, and are so well established that the courts take judicial notice of them. When a person employs an agent of one of these classes to transact business peculiar to his profession or business, it is to be inferred that the principal intends the employment to be regulated by the usages and customs pertaining to it; and hence, in the absence of any indication of a contrary intention, the usual and customary powers of such an agent will be implied. For example, a factor to whom goods are intrusted for sale has implied authority to fix the price, to sell on credit, but not to pledge or to barter.²⁰ There exist other classes of agents, such as shipmasters and bank cashiers, who do not hold themselves out as ready to serve the public generally, and who serve exclusively one employer, whose business is nevertheless confined to well-defined fields of agency, and who likewise are customarily invested with certain powers and charged with certain duties in the course of their employment. The powers and duties of these agents also are to a greater or less extent defined by usage and custom, and in respect to them the same implication of authority to act in the usual and customary manner arises. Illustrations of the implied powers of these agents will be found in discussing the scope of particular agencies.²¹

²⁰ Post, p. 208.

²⁰ Post, p. 222.

²¹ Post, p. 221.

PART II.

RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND THIRD PERSONS.

CHAPTER VIII.

LIABILITY OF PRINCIPAL TO THIRD PERSON— CONTRACT.

- 45. Liability on Contract—Disclosed Principal.
- 46. Apparent Authority.
- 47. Estoppel.
- 48. Scope of Particular Agencies.
- 49. Contract Induced by Collusion of Other Party and Agent.

LIABILITY ON CONTRACT—DISCLOSED PRINCIPAL.

- 45. The principal is liable upon a contract duly made by his agent with a third person—
 - (1) When the agent acts within the scope of his actual authority;
 - (2) When the contract, although unauthorized, has been ratified;
 - (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority.

SAME—APPARENT AUTHORITY.

- 46. "Apparent authority," as the term is used in the foregoing section, includes authority to do whatever is usual and necessary to carry into effect the principal power conferred upon the agent and to transact the business which he is employed to transact; and the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has not notice.

SAME—ESTOPPEL.

47. The principal may be estopped to deny that a person is his agent, or that his agent has acted within the scope of his authority.

Principal, Disclosed or Undisclosed.

In entering into a contract with a third person the agent usually discloses the agency, but the principal is ordinarily liable whether he be disclosed or undisclosed. Subject to some qualifications, the liability of the principal upon the contract is the same in both cases. The liability of the disclosed principal will, however, be considered first, and the liability of the undisclosed principal considered separately.¹

Manner of Execution.

Although an agent has power to bind his principal by a contract made on his behalf within the scope of the authority conferred, the contract may fail to bind him by reason of its form or other circumstances. Where the agent, acting within his authority, makes a contract in the name of the principal, the principal, and he alone, is bound.² And although the contract be unauthorized, if it be made in the name of the principal, and he ratifies it, he, and he only, is bound.³ It does not follow, however, that the principal is not bound because the contract is in the name of the agent; for the principal may be bound although he be undisclosed.⁴ And even if he be disclosed, and the contract made in the name of the agent, the principal is bound, except in the case of contracts under seal and negotiable instruments, if such

§§ 45-47. ¹ Post, p. 231 et seq.

² Johnson v. Ogilby, 3 P. Wm. 277; Owen v. Gooch, 2 Esp. 567; Exp. Hartop, 12 Ves. 352; Robins v. Bridge, 3 M. & W. 114; Mahony v. Kekule, 14 C. B. 390; Green v. Hopke, 18 C. B. 549; Kirkpatrick v. Stainer, 22 Wend. (N. Y.) 244; Judson v. Gray, 11 N. Y. 408, 411; Covell v. Hart, 14 Hun (N. Y.) 252; Bray v. Kettell, 1 Allen (Mass.) 80; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050.

³ Ante, p. 81.

⁴ Post, p. 235.

was the intention of the parties;⁵ and, although the contract is in writing, parol evidence is admissible to show who was the real principal, in order to charge him, but not to discharge the agent from liability.⁶ In such case, either the principal or the agent may be charged upon the contract. On the other hand, the agent, although authorized to bind the principal, may contract in such manner as to bind only himself.⁷ In short, the agent may contract in such manner as to bind the principal only, to bind the principal and himself, to bind himself only, or to bind neither. Logically, it would perhaps be in order at the present time to consider in what manner the agent must contract in order to bind his principal; but it will be convenient to postpone the discussion, and to discuss this phase of the liability of the principal upon contracts made on his behalf in connection with the discussion of the liability of the agent for such contracts toward the person with whom he deals.⁸

Actual Authority.

Every contract duly made by an agent for or on behalf of his principal, pursuant to the authority actually conferred upon him, is binding upon the principal. This is an obvious application of the fundamental doctrine of agency, *qui facit per alium facit per se*. It is to be borne in mind that actual authority may be express or implied, and that even when authority is expressly conferred it includes by implication authority to do what is reasonably necessary to its effective execution⁹ and authority to act in accordance with usage and custom.¹⁰

Ratification.

As we have already seen, the principal is bound by a contract made without authority upon his behalf when he has ratified it.¹¹ This branch of the subject has already been sufficiently discussed.¹²

⁵ Post, p. 235.

⁶ Post, p. 233.

⁷ Post, p. 355.

⁸ Post, p. 330 et seq.

⁹ Ante, p. 175.

¹⁰ Ante, p. 177.

¹¹ Ante, p. 81.

¹² Ante, c. 3.

Apparent Authority—Estoppel.

The power of an agent to render his principal liable upon a contract, or to bind him by a representation, may be far broader than his actual authority. A person may be estopped to deny that another person is his agent; or, if an agency actually exists, may be estopped to deny that an act is within the authority actually conferred. The nature of a so-called "agency by estoppel" has already been explained.¹³ To constitute an estoppel there must have been words or conduct of the principal amounting to a representation of authority, and the person asserting the estoppel must have dealt with the agent in reliance upon the appearance of authority thereby created. A frequent application of the doctrine of estoppel to agency is in cases where the principal is bound by the acts of his agent in excess of his actual authority, but within the authority which it has been represented that he possesses, as where the principal has acquiesced in his agent's unauthorized acts occurring either in a course of dealing with the person asserting the estoppel or with the public, and the person asserting the estoppel has relied upon the appearance of authority to perform other acts of a like nature thereby conferred upon the agent.¹⁴ So, where the principal places his agent in such a situation as to justify a reasonable man in inferring that he has authority to perform a particular act, the principal is estopped, as against one who has dealt with the agent in reliance upon the appearance of authority so created, to deny the agent's authority to perform it, as where one places an agent upon his premises in apparent charge of the business there conducted, or in apparent charge of the business which it might reasonably be inferred would be conducted on the premises.¹⁵

Apparent Authority—When Principal is Bound Independently of Estoppel.

Independently of a technical estoppel, however, the principal may be bound by the acts of his agent in excess of the au-

¹³ Ante, p. 84.

¹⁴ Ante, p. 36.

¹⁵ Ante, p. 37.

thority actually conferred upon him. ¶ Indeed, in most cases where the principal is bound by acts in excess of the actual authority the liability rests, not upon a technical estoppel, but upon the doctrine of agency, by which the principal is liable for all the acts of his agent which are within the scope of the authority usually confided to an agent employed to transact the business which the agent is employed to transact, notwithstanding limitations upon that authority which are not disclosed to those with whom the agent deals.¹⁶ "Every agency carries with it, or includes in it, the authority to do whatever is usual and necessary to carry into effect the principal power, and the principal cannot restrict his liability for acts of the agent within the apparent scope of his authority by private instructions not communicated to those with whom he deals."¹⁷

Same—Illustrations.

For example, the principal is bound by a warranty given by an agent whom he has authorized to make sales if the warranty is a usual one, although he has instructed the agent not to warrant, provided the buyer was not aware of this limitation, the power to warrant in the usual manner being

¹⁶ *Watteau v. Fenwick* [1893] 1 Q. B. 346. See, also, *Whitehead v. Tuckett*, 15 East, 400; *Smith v. McGuire*, 3 H. & N. 554; *Edmunds v. Bushell*, 1 Q. B. 97; *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822; *Gowan v. Bush*, 22 C. C. A. 196, 76 Fed. 349; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Byrne v. Packing Co.*, 137 Mass. 313; *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; *Trainer v. Morison*, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 635; *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Fatman v. Leet*, 41 Ind. 133; *Baker v. Produce Co.*, 113 Mich. 533, 71 N. W. 800; *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Oberne v. Burke*, 30 Neb. 581, 46 N. W. 838.

¹⁷ *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840, per Mitchell, J.

within the agent's "apparent" or "ostensible" authority.¹⁸ Again, if a principal authorizes his agent to buy cotton on his behalf, instructing him in no case to pay more than a certain price, the principal is bound by a contract of purchase, although the agent exceeds his instructions in respect to the price, if the limitation upon his authority is not disclosed to the seller, since the power to fix a price is within the scope of the authority usually confided to an agent employed in that character.¹⁹ So, where a person who traveled about selling his own goods was authorized to sell the plaintiff's goods upon commission, and it was a usual incident to that general authority to fix the terms of sale, including the time, place, and mode of delivery and the price of the goods, and the time and mode of payment, and the agent sold goods on credit, which were forwarded by the principal addressed to the buyer, maked C. O. D., by express, it was held that the defendant expressman, being without notice of the agent's want of authority, was justified in delivering the goods upon the agent's order without payment. "We have a case, then," said the court, "where the agent was apparently clothed with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit, as he might think proper; and, this being so, Moore must be regarded, in respect to third persons, as the plaintiff's general agent, whose authority would not be limited by instructions not brought to the notice of such third persons. As Moore, then, in respect to third persons, had the power to sell on credit, the authority to control the delivery * * * would necessarily come within the scope of his agency; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the agent's want of authority. As to him the agent's apparent authority was real author-

¹⁸ Post, p. 207.

¹⁹ *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822. See, also, *Nunnally v. Goodwin* (Tenn. Ch. App.) 39 S. W. 855.

ity.”²⁰ So, where the plaintiffs solicited the defendant to buy logs, and he referred them to C. as the person who attended to that business for them, and in pursuance of this direction the plaintiffs sought C., and took him where the logs were, and they thereupon agreed on the terms of sale, one of which was that the logs were to be scaled by the scaler employed at the defendant’s mill and paid for according to the scale, it was held that C. had authority to bind the defendant by such an agreement notwithstanding any private instructions limiting C.’s authority to agree that the measurement and price should be so determined. “In this state,” said the court, “the purchase and sale of logs according to a scale to be made is so general and notorious that the courts will take notice of the fact. The manner stipulated * * * was the usual and ordinary way, and hence within the apparent authority of an agent to purchase logs, and the plaintiffs are not bound by any private limitations upon C.’s authority in that regard, not communicated to them.”²¹ So, where an agent was employed to travel about the country and sell goods by sample, power to hire horses and carriages for the transportation of the agent and his samples being necessarily incident to the business required to be done, it was held that the principal was liable to a liveryman who furnished such transportation to the agent, although, unknown to the liveryman, the principal had supplied the agent with money and forbidden him to pledge his credit. “From the nature of the business required to be done by their agent,” said the court, “the defendants held out to those who might have occasion to deal with him that he had the right to contract for the use of teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for.”²²

²⁰ Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45.

²¹ Watts v. Howard, 70 Minn. 122, 72 N. W. 840.

²² Bentley v. Doggett, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827

Same—Basis of Liability.

The use of the words "apparent" or "ostensible" in this connection is somewhat misleading, for it implies that the binding effect upon the principal of an act within the scope of the agent's apparent or ostensible authority in such cases rests upon the doctrine of estoppel. And the same may be said of the frequent use in this connection of the phrase "holding out," as it is used in the passage last quoted. Estoppel, indeed, is not infrequently asserted to be the basis of the doctrine of agency under consideration;²³ but the explanation, it is submitted, is inadequate. The basis of an agency by estoppel must be a representation of authority on the part of the principal, and reliance upon the authority represented to exist on the part of the third person. Yet in the class of cases now under consideration both elements may be lacking.

Let it be assumed, for example, that a traveling agent employed to sell, but forbidden to give some usual warranty, sells with that warranty to a buyer who knows nothing of the agent's authority except what he communicates. The warranty, being within the usual authority of an agent employed in that character, is binding,²⁴ but the principal has made no representation of authority. On the contrary, the only representation of authority is that of the agent himself, who, indeed, by assuming to sell with warranty, does impliedly represent that he is authorized to do so; but this representation, being unauthorized, cannot, for the purpose of creating an estoppel, be attributed to the principal. In other words, it cannot be said that the principal has authorized the agent to hold himself out as authorized to sell, and is consequently estopped, when the agent has so held himself out, to say that he was not authorized to sell with usual

²³ Ewart, Estoppel; Huffcut, Ag. p. 66 et seq., p. 128 et seq.; Johnston v. Investment Co., 46 Neb. 480, 64 N. W. 1100. Against this view, see 13 Green Bag, 50; 15 Harv. L. R. 324.

²⁴ Post, p. 207.

warranty, since the case supposes that the agent was not authorized to hold himself out as authorized to sell without disclosing this limitation upon his authority. It would be reasoning in a circle to say that the principal is estopped because the representation of authority to warrant appears to be within the agent's authority, since the appearance of authority rests upon that very representation.

Moreover, even if the conduct of the principal in permitting the agent to hold himself out as authorized to sell could properly be considered a representation on the principal's part of authority to sell with usual warranty, nevertheless, unless the buyer knew that the warranty given was a usual one, and therefore included by implication in the representation of authority to sell, he could not be said to rely upon any representation of authority to warrant. And the case would be the same if the principal directly held the agent out as authorized to sell, as when a seller should refer an intending buyer to another as his selling agent.²⁵ In either case, if the buyer's right to hold the principal upon the warranty rested upon estoppel, it would be part of the buyer's case to show, not merely that the warranty was a usual one, but that he knew that it was such; or, at least, his right to recover upon the warranty would be defeated if it were shown that he was ignorant that the warranty was a usual one, and consequently did not rely upon the agent's apparent authority to warrant. Or if it were sought to charge a bank upon a contract made by its cashier, or an insurance company upon a contract made by its general agent,²⁶ such contract being within the customary powers of agents employed in that character, but in violation of special instructions, the right of the other party to the contract to recover would depend upon whether he was sufficiently acquainted

²⁵ See *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Trickett v. Tomlinson*, 13 C. B. (N. S.) 663.

²⁶ See cases cited in note 16, *supra*. As to powers of bank cashiers, *post*, p. 220. As to powers of insurance agents, *post*, p. 218.

with the usages and customs of the banking business or the insurance business to know that an agent of that character would ordinarily have authority to make such a contract. Such, however, is not the rule. The principal is bound irrespective of the other party's knowledge of the usual course of business, provided he has not notice of any limitation upon the usual authority. The apparent powers must, indeed, be such as a reasonable man, conversant with business usages, would be justified in assuming to exist, but it is not essential that the party seeking to charge the principal should be acquainted with the usage on which his right depends.

The liability of the principal for the acts of his agent within the scope of his "apparent" authority, as the term is here used, must rest, therefore, not upon a technical estoppel, but upon a broader doctrine of agency, that a principal is liable for acts of his agent which are within the ordinary and usual scope of the business he is employed to transact, notwithstanding undisclosed limitations upon that apparent authority—a doctrine which, as we shall see, applies even when the very existence of the agency is undisclosed.²⁷ It is true that in many cases all the elements of a technical estoppel may exist, but it is by no means necessary that they do exist, to charge the principal, within this doctrine.

No doubt the development of the doctrine was influenced by the practical consideration that "it is more reason that he who puts a trust and confidence in the deceiver should be a loser than a stranger,"²⁸ or, as it is more frequently put, that, "where one of two innocent persons must suffer by the act of a third, he who has enabled the other to occasion the loss must sustain it";²⁹ but these general statements are far from being statements of any principle of universal application.³⁰ One who intrusts the custody of his

²⁷ *Watteau v. Fenwick* [1893] 1 Q. B. 346; post, p. 237.

²⁸ *Hern v. Nichols*, 1 Salk. 289.

²⁹ *Knox v. American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700.

goods to another is not ordinarily bound by an attempted sale, however great the trust and confidence reposed and however innocent the purchaser; but, if the property is intrusted with authority to sell, a sale with usual warranty or usual credit is binding, although warranty and credit, unknown to the buyer, were forbidden.⁸⁰

Same—General and Special Agent.

It must be conceded that the rule that the principal is bound by the acts of his agent within the scope of his apparent or usual authority, notwithstanding undisclosed limitations, is commonly said to apply only to "general" agents. The principal is bound, it is said, by the acts of his general agent, acting within the scope of his general authority, although in violation of his private instructions;⁸¹ but the authority of a "special" agent must be strictly pursued, and if he exceeds his limited authority the principal is not bound.⁸²

Agents are said to be divided, in respect to the extent of their authority, into "universal," "general," and "special" agents. A universal agent has been defined as one "appointed to do all the acts which his principal can personally

⁸⁰ Post, pp. 205, 207, 222.

⁸¹ *Fenn v. Harrison*, 3 T. R. 757; *Whitehead v. Tuckett*, 15 East, 400; *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822; *Allen v. Ogden*, 1 Wash. C. C. (U. S.) 174, Fed. Cas. No. 233; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Lobdell v. Baker*, 1 Metc. (Mass.) 202, 35 Am. Dec. 358; *Markey v. Insurance Co.*, 103 Mass. 78, 92; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Adams Exp. Co. v. Schlessinger*, 75 Pa. 246; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Manning v. Gaskarie*, 27 Ind. 399; *Cruzan v. Smith*, 41 Ind. 298; *Blackwell v. Ketcham*, 53 Ind. 186; *City of Davenport v. Insurance Co.*, 17 Iowa, 276; *Palmer v. Cheney*, 35 Iowa, 281; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Inglis v. Ayer*, 79 Mich. 516, 44 N. W. 942; *Montgomery Furniture Co. v. Hardaway*, 104 Ala. 100, 16 South. 29.

⁸² See cases cited in last note.

do, and which he may lawfully delegate the power to another to do."⁸³ Such an agency, says Story, "may potentially exist; but it must be of the very rarest occurrence."⁸⁴ This term is seldom met with, and universal agents call for no discussion.

A general agent is usually defined as one authorized to act for his principal in all matters concerning a particular business or employment or of a particular nature. A special agent is usually defined as one authorized to do a particular act or to act in a single transaction. "The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only."⁸⁵ Yet while this distinction is commonly said to indicate the dividing line between general and special agents, there is by no means universal agreement in the use of the terms. For example, the term "general agent" is sometimes said to apply to, or to include, any professional or customary agent, such as an attorney, broker, factor, or auctioneer, although he may be employed only in a single transaction.⁸⁶ Under this use of the term a broker employed in a single transaction is a general agent, while if the distinction usually drawn is correct he is a special agent. Sometimes, even, the difference is made to turn upon whether or not the authority, even though it be to do a particular thing, is strictly limited as to the mode of doing it.⁸⁷ If the power of an agent to bind

⁸³ Story, Ag. § 21.

⁸⁴ Id.

⁸⁵ *Butler v. Maples*, 9 Wall. (U. S.) 776, 19 L. Ed. 822. See, also, cases cited in note 31, supra.

⁸⁶ Paley, Ag. (Lloyd's Ed.) 190, note; Evans, Ag. 102; Bowstead, Dig. Ag. art. 1. See *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Bell v. Offutt*, 10 Bush (Ky.) 632; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78.

⁸⁷ Story, Ag. § 18.

"A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner." *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96, per Shepley, J.

his principal by acts within the scope of his apparent authority turned in reality upon whether his agency were general or special, it is obvious that accurate definitions of the terms would be essential, and, indeed, would have been worked out long ago by the courts. It is, however, very generally admitted at the present day that the distinction is unsatisfactory.

The distinction was stated by Story to be as follows: "It seems proper to refer again to * * * the distinction commonly taken between the case of a general agent and that of a special agent, the former being appointed to act in his principal's affairs generally, and the latter to act concerning some particular object. In the former case the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances. In the latter case, if the agent exceeds the special and limited authority conferred upon him, the principal is not bound by his acts, but they become mere nullities, so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority." **

So far as it relates to general agents, as there defined, the passage quoted states the rule with sufficient accuracy, understanding "general authority" as authority to act within the ordinary and usual scope of the business which the agent is authorized to transact.** But, so far as this passage states a different rule for special agents—that is, for agents appointed "to act concerning some particular object"—it is believed that it is incorrect. Clearly, a broker or other customary agent is a special agent, as there defined; but a broker employed in a single transaction has power to bind his principal within the scope of the ordinary authority of a broker employed in such a transaction, notwithstanding private or

** Story, Ag. § 126.

** Ante, p. 183.

undisclosed instructions limiting that authority.⁴⁰ And even a special agent who is not a customary agent may bind his principal by acts within the ordinary and usual scope of the business confided to him, notwithstanding undisclosed limitations. That this is so, if the instructions are intended to be kept secret, and not communicated by the agent to those with whom he may deal, is clear.⁴¹ "No man is at liberty to send another into the market to buy or sell for him as agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from these instructions, to say that he was a special agent, that the instructions were limitations upon his authority; and that those with whom he dealt in the matter of the agency acted at their peril, because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge."⁴²

But it is believed that the rule is not confined to cases where the instructions limiting the usual or apparent authority of a special agent are intended to be kept secret. "If a man sends his servant to market to sell goods, or a horse, for a certain price, and the servant sells them for less, the master is bound by it."⁴³ "Every agency carries with it, or

⁴⁰ Post, p. 224.

⁴¹ *Hatch v. Taylor*, 10 N. H. 538; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

⁴² *Hatch v. Taylor*, 10 N. H. 538.

⁴³ "If a man, by his conduct, holds out another as his agent, by permitting him to act in that character and deal with the world as a general agent, he must be taken to be the general agent of the person for whom he so acts, and the latter is bound, though, in a particular instance, the agent may have exceeded his authority. It is so even in the case of a special agent; as, for instance, if a man sends his servant to market to sell goods, or a horse, for a certain price, and the servant sells them for less, the master is bound by it. There even the violation of a particular authority does not render the sale null and void." *Smith v. McGuire*, 3 H. & N. 554, per Pollock, C. B.

includes in it, the authority to do whatever is usual and necessary to carry into effect the principal power, and the principal cannot restrict his liability for acts of his agent within the apparent scope of his authority by private instructions not communicated to those with whom he deals. These principles apply as well to special as to general agents. An agent with authority to sell or buy has authority to sell or buy in the usual manner."⁴⁴ It is doubtless true that the usual and necessary powers which are incidental to the principal power are ordinarily fewer in the case of an agent employed to act in a single transaction than in the case of an agent employed to act in all matters concerning a particular business.⁴⁵ But upon principle the power of the agent in such cases to bind his principal by acts in excess of his actual authority does not turn upon whether the agency is general or special, but upon whether the powers which he assumes to exercise are such usual and necessary powers as would be implied in the absence of any indication of a contrary intention as incidental to the principal power, provided, of course, that the person seeking to hold the principal had not notice of the terms of the actual authority.

Same—Notice of Limitations upon Apparent Authority.

The burden of proof is upon the person dealing with any one as an agent, through whom he seeks to charge another as principal, to show that the agency did exist, and that the agent had the authority, real or apparent, which he assumed to exercise, or otherwise that the alleged principal is estopped from disputing the agency. A person dealing with any one as an agent who has not been held out as such deals at his peril, and if he does not apply to the alleged principal to ascertain whether an agency exists, and to what extent, he

⁴⁴ *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840.

⁴⁵ *Blackwell v. Ketcham*, 53 Ind. 184; *Chicago & G. W. R. Land Co. v. Peck*, 112 Ill. 408; *Gilbert v. Deshon*, 107 N. Y. 324, 14 N. E. 318.

takes the risk of its existence and of its extent.⁴⁶ It is not in the power of an agent to establish or enlarge his authority by his own declarations.⁴⁷ Nevertheless, if an agency did exist, the third person can charge the principal for any act of the agent within the scope of his authority, although he made no inquiry; and the scope of the authority, as between the principal and a third person who had no notice of unusual limitations, will be measured by the powers which would ordinarily be implied and included in such an agency.⁴⁸ By failing to inquire, the third person does not take the risk of unusual limitations; it is enough to protect him that he had not notice of such limitations, and it is for the principal to show that he had such notice.⁴⁹ And this rule applies as

⁴⁶ *Pole v. Leask*, 33 L. J. (N. S.) Ch. 155, per Lord Cranworth. See, also, *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264, 7 L. Ed. 138; *Hatch v. Taylor*, 10 N. H. 547; *Murdock v. Mills*, 11 Metc. (Mass.) 5; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726; *Rice v. Peninsular Club*, 52 Mich. 87, 17 N. W. 708; *Berry v. Anderson*, 22 Ind. 36; *Davidson v. Porter*, 57 Ill. 300; *Chaffe v. Stubbs*, 37 La. Ann. 656; *Dozier v. Freeman*, 47 Miss. 647.

Where an agent was appointed by resolution expressed by words in present, but intended to not take effect till certain stages of the business were completed, the agent could not bind the company by holding himself out as agent to one who relied merely on his representations, without knowledge of the resolution. *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355.

⁴⁷ Post, p. 256.

⁴⁸ *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822.

⁴⁹ *Bentley v. Doggett*, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827. And see cases cited in notes 46 and 48, supra.

If the principal relies upon a custom to withhold or limit some power which would otherwise be included as necessarily incidental to the main power, it is for him to show that the custom was so universal that the person dealing with the agent must be presumed to have knowledge of it. *Bentley v. Doggett*, supra; *Roche v. Pennington*, 90 Wis. 107, 62 N. W. 946. If such a custom in fact existed, the

well to cases where the third person has dealt with the agent without any direct holding out on the part of the principal as to cases where the principal has directly held him out as having authority.

The rule that the person dealing with an agent need not make inquiry for, and is not affected with notice of, undisclosed limitations upon the apparent, or usual, authority, is commonly stated as applying only to general agents, and it is said that a person dealing with a special agent is bound to make inquiry and is affected with such notice.⁵⁰ What has already been said concerning the distinction between general and special agents is applicable here. No inquiry need be made for secret instructions to a special agent or for limitations upon his authority which are not intended to be disclosed. And it seems that no inquiry need be made for any possible limitations upon the powers which would otherwise necessarily be included and implied as incidents to an agency of the character in question.⁵¹ Where an agent is appointed to do a single act, however, the scope of the apparent authority is in most cases very narrow, and a person dealing with him must ascertain the terms of the authority at his peril.⁵²

apparent authority of the agent would be an authority so limited. In *Baines v. Ewing*, L. R. 1 Ex. 320, 1 H. & C. 511, the principal gave authority to an insurance broker to underwrite marine risks, the risk not to exceed £100 by any one vessel, and the broker underwrote a policy for £150. The assured was not aware of the limitation, but it was well known in Liverpool that in almost all cases, if not in all, a limit was put to the amount for which the broker could sign. It was held that the principal was not liable. "The utmost that can be said," said Bramwell, B., "is that the principal held out the broker as having the authority which a Liverpool broker ordinarily has."

⁵⁰ See cases cited note 31, *supra*.

⁵¹ *Hatch v. Taylor*, 10 N. H. 538; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

⁵² *Blackwell v. Ketcham*, 53 Ind. 184; *Gilbert v. Deshon*, 107 N. Y. 324, 14 N. E. 318; *Milne v. Kleb*, 44 N. J. Eq. 378, 14 Atl. 646; *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. 388.

Where a special agent authorized to buy cotton of a designated

On the other hand, if the person dealing with an agent has notice that he is exceeding his actual authority, such person cannot charge the principal.⁵³ In cases resting upon estoppel this must be so from the very nature of an estoppel. And although the liability of the principal for acts of his agent within the ordinary and usual scope of the business delegated does not rest upon a technical estoppel, nevertheless it is an essential element of the doctrine of agency on which the liability rests that no limitation upon the ordinary and usual authority of such an agent be disclosed.⁵⁴ Of course, if the third person has been informed of limitations he cannot hold the principal beyond the authority so limited.⁵⁵ Knowledge of the limitations, however, is not essential; it is enough if he have notice, actual or constructive.⁵⁶ Actual notice is communicated by knowledge of circumstances sufficient to put him as a reasonable man upon inquiry, which if pursued would lead to knowledge of the limitations.⁵⁷ Such notice

person at a certain place bought cotton of equal value and quality of other persons in a different locality, the principal was not bound. *Robinson Mercantile Co. v. Thompson*, 74 Miss. 847, 21 South. 794.

⁵³ *In re Kern's Estate*, 176 Pa. 373, 35 Atl. 231; *Littleton v. Association*, 97 Ga. 172, 25 S. E. 826; *Park Hotel Co. v. Bank*, 30 C. C. A. 409, 86 Fed. 742 (notice that agent is contracting with himself).

⁵⁴ *Ante*, p. 183 et seq.

⁵⁵ *Strauss v. Francis*, L. R. 1 Q. B. 379; *Wood Mowing Mach. Co. v. Crow*, 70 Iowa, 340, 30 N. W. 609.

⁵⁶ *Howard v. Braithwaite*, 1 Ves. & B. 202, 209; *Collen v. Gardner*, 21 Beav. 540.

⁵⁷ See *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45, where it was held that marking the package C. O. D. was not in law want of authority to authorize delivery without payment, and that it was properly left to the jury whether it was sufficient to put the expressman upon inquiry.

Where husband and wife executed a deed, absolute in form, of the land of the wife, who delivered it to the husband, to be by him delivered as an equitable mortgage for a certain amount, and he delivered it in payment of a larger sum he owed the grantee, who was aware the deed was to be delivered as a security, he was bound to ascertain the conditions of delivery. *Gilbert v. Deshon*, 107 N. Y. 324, 14 N. E. 318; *Brown v. West*, 69 Vt. 440, 38 Atl. 87.

would be communicated by a previous course of dealing between the parties indicating unusual limitations.⁵⁸ So, if the person dealing with an agent has knowledge that his authority is conferred by a power of attorney or other instrument, he will be charged with knowledge of the conditions and limitations of the instrument.⁵⁹ And if the act which the agent assumes to do is one for which the law requires authority in writing, or under seal, or of record, the person dealing with the agent will be charged constructively with notice of the conditions and limitations of the authority.⁶⁰ So the assured is affected with constructive notice of restrictions, contained in his policy, upon the authority of the agent to waive conditions of the policy, although the assured has not read the policy.⁶¹ By the law merchant, a signature "per procuracionem" on a bill of exchange, promissory note, or check operates as constructive notice that the agent had only a limited authority to sign, and the principal is bound only if the agent in signing was acting within the actual limits of his authority.⁶² A restrictive indorsement operates as constructive notice;⁶³ and hence, when a bill or note is indorsed "for collection," this gives notice that the indorsee is merely agent for collection, and has not the legal title.⁶⁴

⁵⁸ Ante, p. 32.

⁵⁹ *Stainback v. Read*, 11 Grat. (Va.) 281, 62 Am. Dec. 648.

⁶⁰ *Backman v. Charlestown*, 42 N. H. 125; *Peabody v. Hoard*, 46 Ill. 242; *Lewis v. Commissioners*, 12 Kan. 186; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

⁶¹ *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; post, p. 219.

⁶² *Stagg v. Elliott*, 12 C. B. N. S. 373, 381; *Attwood v. Munnings*, 7 B. & C. 278; *Alexander v. McKenzie*, 6 C. B. 766; *In re Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. Ed. 169; *Nixon v. Palmer*, 8 N. Y. 398; *Pope v. Bank*, 57 N. Y. 126.

The letters "p. p. a.," added to the signature, are evidence of notice that the agent professes to act per power of attorney. *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341.

⁶³ *Ancher v. Bank*, 2 Doug. 63; *Treuttel v. Barendon*, 8 Taunt. 100.

⁶⁴ *Lloyd v. Sigourney*, 5 Bing. 525; *Commercial Nat. Bank v. Arm-*

Same—Condition of Exercise of Power Peculiarly within Knowledge of Agent—Estoppel.

Where, by a power of attorney, the agent is authorized to exercise the authority upon a certain condition, or in a certain event, as to incur indebtedness not exceeding at any one time a certain amount, it has been held that the person dealing with the agent must, at his peril, ascertain the existence of the fact upon which the right to exercise the power depends, and cannot rely upon the representation of the agent that the fact exists.⁶⁵ A different rule, however, obtains in many jurisdictions, where it is held that when the authority of the agent depends upon some fact outside the terms of the power, which from its nature rests peculiarly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact. In accordance with this rule, it was held in a leading case that where, by the terms of a power of attorney, the authority of the agent to issue negotiable paper was expressly limited (as it would, indeed, have been limited by implication) to the business of the principal, and the agent exercised the power to raise money for his own benefit, but ostensibly for the benefit of his principal, the principal was equitably estopped to deny that the authority had been pursued.⁶⁶

strong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 303; *Manufacturers' Nat. Bank v. Bank*, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; *Freeman's Nat. Bank v. Tube-Works*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5.

⁶⁵ *Mussey v. Beecher*, 3 Cush. (Mass.) 511. See, also, *Lowell Five Cent Sav. Bank v. Inhabitants of Winchester*, 8 Allen (Mass.) 109; *Craycraft v. Selva*, 10 Bush. 696. But see *Montalgnac v. Shlitta*, 15 App. Cas. 357.

⁶⁶ *North River Bank v. Aymar*, 3 Hill (N. Y.) 262. See, also, *Farmers' & Mechanics' Bank v. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, maintaining the authority of *North River Bank v. Aymar*, *supra*.

The principle of this decision is of wide application,⁶⁷ and the failure of many courts to recognize it or to apply it in all cases has resulted in much conflict of authority, as is illustrated in cases involving bills of lading. It is not within the usual powers of the master of a ship or of the shipping agent of a carrier to issue bills of lading for goods not received, and the extent of his authority, real and apparent, is therefore to issue bills only for goods actually received. It follows that the consignee or indorsee for value of a bill of lading acts at his own risk as respects the existence of the fact upon which alone the agent has authority to issue the bill, and that, when the agent has fraudulently and collusively or by mistake issued a bill without receiving the goods, the principal is not liable upon the contract, unless he is liable by virtue of an equitable estoppel. The English rule,⁶⁸ which is followed by many courts of this country,⁶⁹ denies his liability, but his liability is maintained by courts which give full application to the principle in question.⁷⁰ While the earlier rule is a plausible appli-

⁶⁷ Where the proper officer of a bank fraudulently certifies a check, the bank is bound as against a bona fide holder. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Id.*, 16 N. Y. 125, 69 Am. Dec. 678; *Meads v. Bank*, 25 N. Y. 143, 82 Am. Dec. 331; *Merchants' Nat. Bank v. Bank*, 10 Wall. (U. S.) 604, 646, 650, 19 L. Ed. 1008.

⁶⁸ *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104 [wharfinger giving receipt for goods not received]; *Cox v. Bruce*, 18 Q. B. D. 147.

⁶⁹ *Pollard v. Vinton*, 105 U. S. 7, 28 L. Ed. 998; *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Sears v. Wingate*, 3 Allen (Mass.) 103; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Dean v. King*, 22 Ohio St. 118; *Williams v. Railroad Co.*, 93 N. C. 42, 53 Am. Rep. 450; *Louisiana Nat. Bank v. Lavelle*, 52 Mo. 380; *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566.

⁷⁰ *Armour v. Railroad Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Bank of Batavia v. Railroad Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *Brooke v. Railroad Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *St. Louis City*

cation of the doctrine of agency, there seems much reason for applying here, and in analogous cases, the principle of convenience, which is the basis of the equitable estoppel recognized by those courts which maintain the liability of the principal, that "whenever one of two innocent parties must suffer by the act of a third he who has enabled the third person to occasion the loss must sustain it."⁷¹ In jurisdictions where this view prevails the principal is estopped from denying the receipt of the goods to the prejudice of a third person who has dealt with the agent or acted on his representation in good faith, in the ordinary course of business.

Same—Public Agent.

The rule that a principal is bound by the acts of his agent, acting within the scope of his general authority, although he acts in violation of special instructions, does not apply to public agents.⁷² This rests partly upon the ground that the powers and duties of public agents are defined and limited by public law, of which persons dealing with such agents are charged with notice;⁷³ and also upon the ground of public policy, "for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public."⁷⁴ "The government

& P. R. Co. v. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; Wichita Sav. Bank v. Railroad Co., 20 Kan. 519; Fletcher v. Elevator Co., 12 S. D. 643, 82 N. W. 184.

⁷¹ For an able presentation of the arguments pro and con, see the opinion of Mitchell, J., in National Bank of Commerce v. Railroad Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 203, 20 Am. St. Rep. 506. Post, p. 294.

⁷² Lee v. Munroe, 7 Cranch (U. S.) 366, 3 L. Ed. 373; Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 882; Delafield v. State of Illinois, 26 Wend. (N. Y.) 102.

⁷³ Mayor of Baltimore v. Eschbach, 18 Md. 276, 282; New York & C. S. S. Co. v. Harbison (D. C.) 16 Fed. 681; Id. (C. C.) 691.

⁷⁴ Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 832.

or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government." ⁷⁵

Same—Contracts Beyond Scope of Authority.

It follows, of course, from what has been said, that if an act is not within the actual authority, nor within the apparent authority, of an agent, the principal is not bound by it, unless he subsequently ratifies it.⁷⁶ If, for example, the principal authorizes a stockbroker to sell stock, he is not bound by a sale on credit, because he has not actually authorized it, and it is not usual or necessary, and hence not within the apparent authority of the broker, to sell stock on credit.⁷⁷ So, if the principal intrusts goods to a factor to sell, he is not bound by a pledge, since a pledge is not within the usual authority of a factor, and there is no actual authority.⁷⁸ An exception to the general rule exists by the law merchant in case of negotiable instruments. An agent, like any other person, can transfer title to money or to a negotiable instrument transferable by delivery, in his possession, to a bona fide purchaser for value without notice, notwithstanding absence of authority to transfer it.⁷⁹ If, however, the instrument is transferable by indorsement, his power to transfer title is no greater than his actual or apparent authority.⁸⁰

⁷⁵ *Whiteside v. United States*, 93 U. S. 247, 23 L. Ed. 882.

⁷⁶ *Wiltshire v. Sims*, 1 Camp. 258; *Re Cunningham*, 36 Ch. Div. 532; *Wheeler v. Sleigh Co. (C. C.)* 39 Fed. 347; *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726; *Deering & Co. v. Kelso*, 74 Minn. 41, 76 N. W. 792, 73 Am. St. Rep. 324; *Oberne v. Burke*, 30 Neb. 581, 46 N. W. 838; *Blackmer v. Mining Co.*, 187 Ill. 32, 58 N. E. 289.

⁷⁷ *Wiltshire v. Sims*, 1 Camp. 258.

⁷⁸ *Post*, p. 317. As to changes in the law made by the factors' acts, *post*, pp. 315, 317.

⁷⁹ *Post*, pp. 315, 316.

⁸⁰ See *Robinson v. Yarrow*, 7 Taunt. 455; *post*, p. 316.

SCOPE OF PARTICULAR AGENCIES.

48. The foregoing rules apply to all classes of private agents, and will be illustrated by considering the scope of the authority of the following:

- (1) Agents to sell.
- (2) Agents to purchase.
- (3) Agents to collect.
- (4) Agents to execute commercial paper.
- (5) Agents to manage business.
- (6) Bank cashiers.
- (7) Insurance agents.
- (8) Shipmasters.
- (9) Factors.
- (10) Brokers.
- (11) Auctioneers.
- (12) Attorneys at law.

In General.

It has already been explained that every agent, in the execution of his express authority, unless the principal has indicated a contrary intention, has implied authority to do what is reasonably necessary to effect what he is directed to do,¹ and furthermore has implied authority to act in accordance with the usages and customs of the business which he is employed to transact.² It is the express authority, as thus supplemented by what is to be implied, that constitutes the actual authority of the agent, by which the rights and duties of the principal and the agent inter se are measured. And it is the express authority, supplemented by those necessary and usual powers, which, in the absence of notice that those powers have been denied or limited, constitutes the apparent authority of the agent in dealing with third persons. The scope of any particular agency must depend, therefore, both as between the principal and the agent (where the powers otherwise implied have not been limited), and as between the principal and third persons who have not notice

§ 48. ¹ Ante, pp. 174, 175.

² Ante, pp. 174, 177.

that these powers have been limited, not merely upon the nature of the acts directed and their necessary incidents, but upon the usages and customs which prevail in reference to the performance of such acts, either generally or when performed by an agent of the class employed.

As has been pointed out,³ there are certain classes of agents, such as factors, brokers, auctioneers, and attorneys at law, who serve the public generally, and who, by virtue of the usages of their profession, are invested, in the absence of any indication of a contrary intention, with well-defined powers. And there are other classes of agents, such as shipmasters and bank cashiers, and in some cases insurance agents, who serve only one employer, but whose powers, within the field of their agency, are in the same manner largely defined by usage.⁴ But, while usage plays a larger part in defining the powers of agents of these two classes, the same principles are applicable in determining the scope of their authority as in the case of other agents.

It is beyond the purpose of this book to discuss in detail the scope of particular authorities or particular agencies, but a brief discussion of some of them is desirable for further illustration. It is to be borne in mind throughout this discussion that the express authority, as supplemented by the powers which are *prima facie* to be implied, is also the apparent authority of the agent in respect to third persons who have not notice that the powers otherwise to be implied have been limited.

Agent to Sell.

(a) *Personalty.* Authority to sell personal property is in most instances conferred verbally or by informal writing, and may, of course, be inferred from the conduct of the principal. No authority to sell is to be inferred from the mere possession of the goods.⁵ Intrusting another with the pos-

³ Ante, p. 179.

⁴ Ante, p. 179.

⁵ *Cole v. Northwestern Bank*, L. R. 10 C. P. 354; *Johnson v. Credit Lyonnais*, 2 C. P. D. 224, affirmed 3 C. P. D. 32; *Saltus v. Everett*,

session, indeed, if accompanied by other circumstances investing the possessor with an appearance of ownership, may estop the owner from denying the ownership of the person whom he has trusted as against a purchaser from him who has relied upon the apparent ownership—as where the owner has invested the person intrusted with possession with the indicia, or documentary evidence, of title.⁶ And, perhaps, if the owner sends his goods to a place where it is the ordinary business of the person to whom they are confided to sell as agent, as to an auction room, the owner may be estopped, as against a purchaser who has relied upon the appearance of authority to sell, to deny that authority.⁷ But it is not enough to raise an estoppel that the person to whom the goods are intrusted is a dealer in that class of goods,⁸ although that fact might have weight in connection with other

20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Covill v. Hill*, 4 Denio (N. Y.) 323.

⁶ *Pickering v. Busk*, 15 East, 38 (permitting transfer in books of wharfinger from name of seller to that of broker); *Dyer v. Pearson*, 3 B. & C. 38; *Cole v. Northwestern Bank*, L. R. 10 C. P. 354; *Calais Steamboat Co. v. Van Pelt*, 2 Black, 372, 17 L. Ed. 282 (permitting vessel to be enrolled in name of agent); *Nixon v. Brown*, 57 N. H. 34 (permitting agent to retain bill of sale taken in his own name); *McNeill v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341 (delivering to broker certificate of stock indorsed with blank assignment and power of attorney purporting to be executed for consideration); *Walker v. Railway Co.*, 47 Mich. 338, 11 N. W. 187.

⁷ *Pickering v. Busk*, 15 East, 38, per Lord Ellenborough. See, also, *Cole v. Northwestern Bank*, L. R. 10 C. P. 354, 364, 365; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

Plaintiff, a dealer in pianos, intrusted a piano to an agent, also a piano dealer, to leave at defendant's house, intending himself to thereafter go to the house to try to sell the piano to defendant. The agent, however, sold the piano to defendant, and received and appropriated the money. The agent had previously, as plaintiff knew, been endeavoring to sell defendant a piano. Held, that the sale was within the agent's apparent authority. *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547.

⁸ *Riggs v. Evans* [1894] 1 Q. B. 88; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Gilman Linseed Oil Co. v. Norton*, 50 Iowa, 434,

circumstances indicating that the owner had conferred actual authority upon him.*

An agent authorized to sell has implied authority to fix the price, provided it is not unreasonable, and to agree upon the terms of sale, provided they are usual.¹⁰ Authority to sell confers only authority to sell for money, and hence does not confer authority to sell on credit, unless there is

56 N. W. 663, 48 Am. St. Rep. 400. See *Wilkinson v. King*, 2 Camp. 335.

Plaintiff intrusted an article to a dealer in such articles, who also, as a known part of his business, sold such articles for others in his own name, having them in his possession. He was forbidden to sell without first obtaining authority. Held, that plaintiff could recover the article from an innocent purchaser. "The true test," said *Wills, J.*, "is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all. If it does, and the dealing effected is of the same nature as the dealing contemplated by the authority, and the agent carries on a business in which he ordinarily effects for other people such a disposition as he does effect, what he has done is within the general authority conferred, and any limitations imposed as to the terms on which, or manner in which, he is to sell are matters which may give a right of action by the principal, but cannot affect the person who contracts with the agent. It is within the scope of the authority that the agent should sell the goods on some terms, and it is not usual in the trade to inquire into the limits or conditions of an authority of that kind; and therefore the principal is supposed, as respects other people, to have clothed the agent with the usual authority. The foundation, however, of the whole thing is that the agent should be authorized to enter into some such transaction. If the principal has entrusted the goods to the agent for some other purpose, the agent is acting outside his authority in selling them at all; and the principal, whose goods have been disposed of without any authority at all so to do, is entitled to recover them in spite of the disposition." *Biggs v. Evans*, *supra*.

* *Smith v. Clews*, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502.

¹⁰ *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Flanders v. Putney*, 58 N. H. 358; *United States School Furniture Co. v. Board* (Ky.) 88 S. W. 804.

usage to that effect,¹¹ as in the case of a factor,¹² or to accept paper in payment,¹³ or to exchange or barter,¹⁴ or to pledge or mortgage.¹⁵ Authority to sell is not to be construed as authority to sell at auction.¹⁶ The agent has implied authority to warrant the goods, if in the sale of such goods it is usual to give a warranty,¹⁷ but not otherwise;¹⁸ and he may not give an unusual warranty,¹⁹ or warrant if he belongs

¹¹ *State of Illinois v. Delafield*, 8 Paige (N. Y.) 527; *Burks v. Hubbard*, 69 Ala. 379; *Payne v. Potter*, 9 Iowa, 549; *Graul v. Strutzel*, 53 Iowa, 715, 6 N. W. 119, 36 Am. Rep. 250. See, also, *Wiltshire v. Sims*, 1 Camp. 258; *Pelham v. Hilder*, 1 Y. & Coll. 3. Cf. *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45.

¹² Post, p. 222.

¹³ *Harlan v. Ely*, 68 Cal. 522, 9 Pac. 947.

¹⁴ *Guerreiro v. Pelle*, 3 B. & Ald. 618 (factor); *Taylor & Farley Organ Co. v. Starkey*, 59 N. H. 142; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795.

¹⁵ *Voss v. Robertson*, 46 Ala. 483; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259; post, p. 223.

¹⁶ *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

A power of attorney authorizing a public sale does not authorize a private sale. *The G. H. Montague*, 4 Blatchf. 461, Fed. Cas. No. 5,377.

¹⁷ *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Ahern v. Goodspeed*, 72 N. Y. 108; *Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Dayton v. Hooglund*, 39 Ohio St. 671; *Talmage v. Bierhausa*, 103 Ind. 270, 2 N. E. 716; *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876; *Westurn v. Page*, 94 Wis. 251, 68 N. W. 1003; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. 675; *Case Threshing Mach. Co. v. McKinnon*, 82 Minn. 75, 84 N. W. 646.

¹⁸ Some of the cases, however, declare the rule without qualification. *Schuchardt v. Allens*, 1 Wall. (U. S.) 359, 17 L. Ed. 642. "Until the contrary is made to appear, it will be presumed that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity or article, where the thing sold is not present and subject to inspection." *Talmage v. Bierhausa*, 103 Ind. 270, 2 N. E. 716. Cf. *Pickert v. Marston*, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876.

¹⁹ *Upton v. Mills*, 11 Cush. (Mass.) 583, 59 Am. Dec. 163; *Smith v. Tracy*, 36 N. Y. 79; *Angersinger v. McNaughton*, 114 N. Y. 535,

to a class of agents, as auctioneers, not usually so authorized.²⁰ If the sale is one usually attended with warranty, the principal will be bound although the agent was forbidden to warrant, unless the buyer had notice of the restriction;²¹ a warranty in such case being within the agent's apparent authority. The cases affirming the power to warrant are for the most part cases of so-called general agents, and it has sometimes been questioned whether a special agent can bind his principal even by a usual warranty, but upon principle the same rule applies to special agents.²²

An agent who is intrusted with the possession of goods which he is authorized to sell has implied authority to receive payment.²³ So a clerk employed to sell over the

21 N. E. 1022, 11 Am. St. Rep. 687; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Id.*, 73 Ala. 446; *Palmer v. Hatch*, 46 Mo. 585.

20 *Payne v. Leconfield*, 51 N. J. Q. B. 642; *Dodd v. Farlow*, 11 Allen (Mass.) 426, 87 Am. Dec. 726.

21 *Howard v. Sheward*, L. R. 2 C. P. 148; *Boothby v. Scales*, 27 Wis. 636; *Murray v. Brooks*, 41 Iowa, 45; *Flatt v. Osborne*, 33 Minn. 98, 22 N. W. 440; *Stewart v. Cowles*, 67 Minn. 184, 69 N. W. 695.

Otherwise if buyer has notice. *Wood Mowing Mach. Co. v. Crow*, 70 Iowa, 340, 30 N. W. 609; *Furneaux v. Esterly*, 36 Kan. 539, 13 Pac. 824.

22 See *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Tice v. Gallup*, 2 Hun (N. Y.) 446; *Randall v. Kehler*, 60 Me. 37, 11 Am. Rep. 169; *Deming v. Chase*, 48 Vt. 382.

The servant of a horse dealer authorized to sell has implied authority to warrant, a warranty on the part of horse dealers being usual. *Howard v. Sheward*, L. R. 2 C. P. 148.

The servant of a person not a horse dealer when authorized to sell privately, has not such implied authority. *Brady v. Todd*, 9 C. B. (N. S.) 592.

The servant of a person not a horse dealer, if authorized to sell at a fair, has such implied authority; a warranty by the seller at a fair, where stranger meets stranger, being in the usual course of business. *Brooks v. Hassell*, 49 L. T. 569; *Alexander v. Gibson*, 2 Camp. 555.

23 *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577.

As to distinction between factor and broker, post, pp. 222, 224.

counter has ordinarily implied authority to receive payment at the time of sale, but not afterwards.²⁴ On the other hand, authority to sell, if the agent is not in possession, does not ordinarily carry with it the power to receive payment.²⁵ A fortiori a traveling agent employed merely to solicit orders has not such power.²⁶ If it is within the apparent authority of an agent to receive payment, the buyer is, of course, not affected by limitations thereon of which he has not notice.²⁷ When, in such a case, the buyer receives from the seller a bill embodying a notification that payment must be made directly to the principal, it has been held that the buyer, although he fails to read the notification, is charged with constructive notice;²⁸ but it seems that the question is properly one of fact, and depends upon whether the buyer, under the circumstances, failed to use reasonable care in not discovering the notification.²⁹ After a sale has

²⁴ *Kaye v. Brett*, 5 Ex. 269; *Hirshfield v. Waldron*, 54 Mich. 649, 20 N. W. 628; *Law v. Stokes*, 32 N. J. Law, 252, 90 Am. Dec. 655.

²⁵ *Higgins v. Moore*, 34 N. Y. 417; *Law v. Stokes*, 32 N. J. Law, 252, 90 Am. Dec. 655; *Selple v. Irwin*, 30 Pa. 513; *Crosby v. Hill*, 39 Ohio St. 100; *Clark v. Smith*, 88 Ill. 298; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Brown v. Lally*, 79 Minn. 38, 81 N. W. 538; *Kane v. Barstow*, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490; *Simon v. Johnson*, 101 Ala. 368, 13 South. 491.

Where it was customary to pay traveling salesmen, and the contract made by the salesman provided for payment to him, payment held good. *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682. See, also, *Trainer v. Morison*, 78 Me. 100, 3 Atl. 183, 57 Am. Rep. 790.

²⁶ *Kornemann v. Monaghan*, 24 Mich. 36; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308; *Chambers v. Short*, 79 Mo. 205 (canvassing agent for book); *Crawford v. Whittaker*, 42 W. Va. 430, 26 S. E. 516.

²⁷ *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682.

²⁸ *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740. See, also, *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655.

²⁹ *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Luckle v. Johnston*, 89 Ga. 321, 15 S. E. 459. See, also, *Trainer v. Morison*, 78 Me. 100, 3 Atl. 183, 57 Am. Rep. 790; *Kinsman v. Kershaw*, 119 Mass. 140.

been made the agent has no power to rescind it.³⁰ Of course, authority to sell does not confer power to transfer in payment of the agent's own debt.³¹

(b) *Realty*. Authority to sell implies power to convey,³² and authority to execute a deed must necessarily be conferred by power under seal.³³ Authority to sell land is therefore subject to the rule of strict construction applicable to formal instruments, in the discussion of which the construction of powers to sell real estate has been already somewhat illustrated.³⁴ As we have seen, however, a conveyance executed by an agent authorized only by parol may take effect as a contract to convey.³⁵ An agent authorized merely to enter into a contract of sale, but not to convey, has no implied authority to receive payment,³⁶ except such sum as may be payable upon execution of the contract. An agent authorized to convey has implied authority to receive any part of the purchase money which is payable at the time,³⁷ but not deferred payments.³⁸ It seems that there is no implied authority to sell except for cash,³⁹ although to give a reasonable credit, securing deferred payments by pur-

³⁰ *Nelson v. Albridge*, 2 Starkie, 438; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Fletcher v. Nelson*, 6 N. D. 94, 69 N. W. 53. See, also, *Stilwell v. Insurance Co.*, 72 N. Y. 385.

³¹ *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488; *Thompson v. Barnum*, 49 Iowa, 392. See, also, *Dowden v. Cryder*, 55 N. J. Law, 329, 26 Atl. 941.

³² Ante, p. 170.

³⁴ Ante, p. 103.

³³ Ante, p. 20.

³⁵ Ante, p. 22.

³⁶ *Munn v. Joliffe*, 1 M. & R. 326 (Cf. *Ireland v. Thompson*, 4 C. B. 149); *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. 913.

³⁷ *Peck v. Harriott*, 6 Serg. & R. 146, 9 Am. Dec. 415; *Johnson v. McGruder*, 15 Mo. 365; *Carson v. Smith*, 5 Minn. 78 (Gil. 53), 77 Am. Dec. 539; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339.

³⁸ *Johnson v. Craig*, 21 Ark. 533.

³⁹ *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Henderson v. Beard*, 51 Ark. 483, 11 S. W. 766 (not to sell on credit without retaining lien).

chase money mortgage, might be implied if a usage to that effect were shown,⁴⁰ and would be conferred by a grant of authority to sell "on such terms as shall seem meet."⁴¹ Since authority to convey must be conferred by written instrument, the apparent authority of such an agent is necessarily small.

Agent to Purchase.

Like an agent to sell, an agent to buy personal property has implied authority to fix the price, provided the price is reasonable, and to agree upon the terms of purchase, provided they are usual.⁴² If he is not supplied with funds, he has by implication authority to buy on credit;⁴³ but if he is supplied with funds, such implication does not arise, unless the custom of the trade is to buy on credit.⁴⁴ Neither may he execute negotiable paper in payment, unless the purpose of the agency cannot otherwise be accomplished.⁴⁵ But, if the agency is such that a purchase on credit is usual, the principal is bound notwithstanding undisclosed limitations upon that authority.⁴⁶ If authorized to buy on credit, he

⁴⁰ *Silverman v. Bullock*, 98 Ill. 11.

⁴¹ *Carson v. Smith*, 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539.

⁴² *Owen v. Brockschmidt*, 54 Mo. 285; *Wishard v. McNeill*, 86 Iowa, 474, 52 N. W. 474.

⁴³ *Sprague v. Gillett*, 9 Metc. (Mass.) 91; *Spear & Tietjen Supply Co. v. Van Riper* (D. C.) 103 Fed. 689. Cf. *Taft v. Baker*, 100 Mass. 68.

⁴⁴ *Jaques v. Todd*, 8 Wend. (N. Y.) 83; *Boston Iron Co. v. Hale*, 8 N. H. 363; *Temple v. Pomroy*, 4 Gray (Mass.) 128; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Komorowski v. Krumdick*, 56 Wis. 23, 13 N. W. 881.

⁴⁵ *Taber v. Cannon*, 8 Metc. (Mass.) 456; *Webber v. Williams College*, 23 Pick. (Mass.) 302; *Temple v. Pomroy*, 4 Gray (Mass.) 128; *Morris v. Bowen*, 52 N. H. 416. See, also, *Oberne v. Burke*, 30 Neb. 581, 46 N. W. 839.

⁴⁶ *Watteau v. Fenwick* [1893] 1 Q. B. 346; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Hubbard v. Tenbrook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *Liddell v. Sahline*, 55 Ark. 627, 17 S. W. 705.

may make the necessary representations as to the solvency of the buyer.⁴⁷ He can have no implied authority to buy goods of a different kind,⁴⁸ or of greater amount,⁴⁹ or for a higher price,⁵⁰ or from persons with whom he is not authorized to deal.⁵¹ If, however, he has been employed in a capacity in which an agent so employed would usually have power to make the purchase in question, he can bind his principal within the scope of such apparent or usual authority.⁵²

Agent to Collect.

Authority to receive payment will, of course, be implied whenever it is a necessary and usual incident to the business delegated, and may be implied from a course of dealing between the parties or other circumstances.⁵³ The mere fact that an agent is intrusted with a note payable to his principal raises no implication of authority to collect it, nor is the mere possession ground to raise an estoppel.⁵⁴ Neither is authority to collect money payable under a contract to be im-

⁴⁷ *Hunter v. Machine Co.*, 20 Barb. (N. Y.) 493.

⁴⁸ *Hopkins v. Blane*, 1 Call (Va.) 361; *Davies v. Lyon*, 36 Minn. 427, 31 N. W. 688.

⁴⁹ *Olyphant v. McNair*, 41 Barb. (N. Y.) 446.

⁵⁰ See *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

⁵¹ *Peckham v. Lyon*, 4 McLean (U. S.) 45, Fed. Cas. No. 10,809; *Eckart v. Roehm*, 43 Minn. 27, 45 N. W. 443.

⁵² *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822; *Hill v. Miller*, 76 N. Y. 32. And see *Shrimpton & Son v. Brice*, 102 Ala. 655, 15 South. 452, and cases cited, note 46.

⁵³ *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; *Luckle v. Johnston*, 89 Ga. 321, 15 S. E. 459.

The circumstances may be such as to estop the creditor to deny the authority. *Howe Mach. Co. v. Ballwegg*, 89 Ill. 315; *Quinn v. Dresbach*, *supra*.

⁵⁴ *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Wardrop v. Dunlop*, 1 Hun (N. Y.) 325; *Id.*, 59 N. Y. 634.

The fact that a bill presented by an alleged agent was made out in the handwriting of the seller, and upon his billhead, is not evidence of authority to collect. *Hirshfield v. Waldron*, 54 Mich. 649, 20 N. W. 628.

plied from the fact that the agent has negotiated it.⁵⁵ An agent who has negotiated a loan and who is permitted to retain possession of the note or other securities, as a bond and mortgage, has, however, implied authority to collect the interest and the principal when they fall due; and payment to the agent under such circumstances will bind the creditor notwithstanding that the agent has not actual authority to collect, unless the debtor has notice of the limitation upon the apparent authority.⁵⁶ The debtor must satisfy himself at his peril that the agent has possession, for the implication of authority ceases whenever the securities are withdrawn from his possession.⁵⁷

⁵⁵ Ante, p. 209. See, also, *Thompson v. Elliott*, 73 Ill. 221; *Tew v. Labiche*, 4 La. Ann. 526.

⁵⁶ *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 612; *Haines v. Tohlmann*, 25 N. J. Eq. 179.

⁵⁷ *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323; *Gulford v. Stacer*, 53 Ga. 618; *Stiger v. Bent*, 111 Ill. 328; *Tappan v. Morseman*, 18 Iowa, 499; *Security Co. v. Graybeal*, 85 Iowa, 543, 52 N. W. 497, 39 Am. St. Rep. 311; *Whelan v. Reilly*, 61 Mo. 565; *Trull v. Hammond*, 71 Minn. 172, 73 N. W. 642; *Budd v. Broen*, 75 Minn. 316, 77 N. W. 979; *Thomas v. Swanke*, 75 Minn. 326, 77 N. W. 981; *Schenk v. Dexter*, 77 Minn. 15, 79 N. W. 526.

Of course actual authority may be shown, although there is not possession. *General Convention of Congregational Ministers v. Torkelson*, 73 Minn. 401, 76 N. W. 215; *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213; *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111; *Springfield Sav. Bank v. Kjaer*, 82 Minn. 180, 84 N. W. 752; *Shane v. Palmer*, 43 Kan. 481, 23 Pac. 594.

It seems that the debtor is bound by payment to an agent who made the loan and is in possession of the securities, not by reason of an estoppel, but because authority to receive payment is a usual incident of an agent employed in that character; and hence that it is not necessary that the person making payment see the securities, or even know that they are in possession, provided they in fact are in possession. *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 614. And see dissenting opinion of Potter, J., in *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643. In the latter case, however, the rule is by the court made to rest upon the ground of estoppel.

Authority to collect means to receive payment in legal currency; that is, in legal tender or what is by common consent considered and tendered as money and passes as such at par.⁸⁸ An agent employed to collect has not implied authority to receive payment in merchandise,⁸⁹ or by bill or note,⁹⁰ or even by check.⁹¹ If authorized to receive paper in lieu of cash, he has no implied authority to indorse.⁹² He may receive part payment on account of the debt,⁹³ but has no implied authority to discharge it for less than the whole amount, or to compromise,⁹⁴ or to extend the time of payment.⁹⁵ He has no implied authority to receive payment before the obligation is due,⁹⁶ nor to collect the principal by reason of authority to collect interest.⁹⁷ Authority to collect implies authority to take all necessary and usual means therefor, and hence to bring suit and employ counsel.⁹⁸

⁸⁸ *Ward v. Smith*, 7 Wall. (U. S.) 447, 19 L. Ed. 207; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 723; *Robinson v. Anderson*, 108 Ind. 152, 6 N. E. 12.

⁸⁹ *Pitkin v. Harris*, 69 Mich. 133, 37 N. W. 61; *Mudgett v. Day*, 12 Cal. 139.

⁹⁰ *Sykes v. Giles*, 5 M. & W. 645; *Langdon v. Potter*, 13 Mass. 319; *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; *Drain v. Doggett*, 41 Iowa, 682; *Jackson v. Insurance Co.*, 79 Minn. 43, 81 N. W. 545, 82 N. W. 366; *Scully v. Dodge*, 40 Kan. 395, 19 Pac. 807.

⁹¹ *Bridges v. Garrett*, L. R. 5 C. P. 451; *Broughton v. Silloway*, 114 Mass. 71, 19 Am. Rep. 312.

⁹² *Hogg v. Snaith*, 1 Taunt. 347; *Robinson v. Bank*, 86 N. Y. 404; *Graham v. Institution*, 46 Mo. 186; *Jackson v. Bank*, 92 Tenn. 154, 20 S. W. 820, 18 L. R. A. 663, 36 Am. St. Rep. 81. Cf. *National Bank of the Republic v. Bank*, 50 C. C. A. 443, 112 Fed. 726.

⁹³ *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Whelan v. Reilly*, 61 Mo. 565.

⁹⁴ *Padfield v. Green*, 85 Ill. 529; *Herring v. Hottendorf*, 74 N. C. 588.

⁹⁵ *Ritch v. Smith*, 82 N. Y. 627; *Gerrish v. Maher*, 70 Ill. 470.

⁹⁶ *Breming v. Mackie*, 3 F. & F. 197; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Park v. Cross*, 76 Minn. 187, 78 N. W. 1107, 77 Am. St. Rep. 630.

⁹⁷ *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323.

⁹⁸ *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216; *Scott v.*

Agent to Execute Commercial Paper.

Authority to draw, accept, make, or indorse bills, notes, and checks will not readily be implied as an incident to the express authority of an agent.⁶⁹ It must ordinarily be conferred expressly. The authority may be implied if the execution of the paper is a necessary incident to the business,⁷⁰ but it will not be deemed a necessary incident unless the purpose of the agency cannot otherwise be accomplished.⁷¹ The rule has already been illustrated in discussing the powers of agents employed to buy,⁷² and will be further illustrated in the next section.⁷³ Where the power is expressly conferred, it must be strictly pursued; and, unless the apparent authority of the agent exceeds his actual authority, paper executed by him will not bind the principal if the agent departs from the terms of his authority in regard to the amount⁷⁴ or time⁷⁵ of the paper or its character in other

Elmerdorf, 12 Johns. (N. Y.) 317; Merrick v. Wagner, 44 Ill. 266; Moore v. Hall, 48 Mich. 145, 11 N. W. 844; Ryan v. Tudor, 31 Kan. 366, 2 Pac. 797.

As to power to foreclose, see Burchard v. Hull, 71 Minn. 430, 74 N. W. 163.

⁶⁹ Palge v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; Webber v. Williams College, 23 Pick. (Mass.) 302; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Chicago Electric Light Renting Co. v. Hutchinson, 25 Ill. App. 476.

⁷⁰ Merchants' Bank v. Bank, 1 Ga. 418, 44 Am. Dec. 665 (power to indorse a necessary incident to authority to discount); Yale v. Eames, 1 Metc. (Mass.) 486 (power to indorse without recourse a necessary incident to authority to sell note); Beaman v. Whitney, 20 Me. 413.

⁷¹ Temple v. Pomroy, 4 Gray (Mass.) 128; Jackson v. Bank, 92 Tenn. 154, 20 S. W. 822, 18 L. R. A. 663, 36 Am. St. Rep. 81. And see case cited, note 69.

⁷² Ante, p. 211. As to power of collection agent to indorse, ante, p. 214.

⁷³ Post, p. 217.

⁷⁴ King v. Sparks, 77 Ga. 285, 1 S. E. 260, 4 Am. St. Rep. 85; Blackwell v. Ketcham, 53 Ind. 184.

⁷⁵ Batty v. Carswell, 2 Johns. (N. Y.) 48; New York Iron Mine Co. v. Bank, 44 Mich. 344, 6 N. W. 823; Tate v. Evans, 7 Mo. 419.

respects.⁷⁶ Where the power exists, however, it is of course confined to the business of the agency, and does not authorize the making of paper for the benefit of the agent,⁷⁷ or the making of accommodation paper.⁷⁸

Agent to Manage Business.

The implied authority of an agent intrusted with the general management of some particular business, like that of other agents, is *prima facie* coextensive with the business delegated to his care, and includes authority to do whatever is necessary and usual to carry into effect the principal power or powers, and whatever is within the scope of the authority usually confided to an agent employed in that capacity.⁷⁹ The powers of managing agents, therefore, while differing with the different nature of the business which they may be employed to manage, are necessarily very broad.

⁷⁶ *Nixon v. Palmer*, 8 N. Y. 398; *Farmington Sav. Bank v. Buzzell*, 61 N. H. 612; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Steinback v. Read*, 11 Grat. 281, 62 Am. Dec. 648.

As to the liability of the principal upon paper delivered with authority to insert material terms in blank spaces left for that purpose, see *Norton, B. & N.* (3d Ed.) 258.

⁷⁷ *North River Bank v. Aymar*, 8 Hill (N. Y.) 262; *Camden Safe Deposit & Trust Co. v. Abbott*, 44 N. J. Law, 257; *Steinback v. Read*, 11 Grat. 281, 62 Am. Dec. 648.

A power of attorney given by a corporation, authorizing an agent to draw checks on a bank "for the use of" the company, does not impose on the bank the responsibility of seeing that the money drawn on such checks is devoted to the use of the company; and it is protected in the payment of such a check, drawn payable to "Cash," to the agent himself, where made in good faith, and where money had usually been drawn by the agent in that manner.—*Warren-Scharf Asphalt Pav. Co. v. Bank*, 38 C. C. A. 108, 97 Fed. 181.

⁷⁸ *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Wallace v. Bank*, 1 Ala. 565.

⁷⁹ *Smith v. McGulre*, 8 H. & N. 554; *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *Watteau v. Fenwick* [1893] 1 Q. B. 346; *German Fire Ins. Co. v. Grunert*, 112 Ill. 68, 1 N. E. 113; *Roche v. Pennington*, 90 Wis. 107, 62 N. W. 946; *Collins v. Cooper*, 65 Tex. 460; *Lowenstein v. Lombard, Ayres & Co.*, 164 N. Y. 324, 58 N. E. 44.

Thus, the manager of a store,⁸⁰ a hotel,⁸¹ a farm,⁸² or a mine⁸³ has implied authority to buy upon his principal's credit whatever goods or supplies are needful to conduct the business, and to make whatever other contracts, such as contracts of employment, are needful to that end.⁸⁴ Beyond what is necessary and usual his powers cease.⁸⁵ The manager of a store or farm has implied authority to sell whatever it is necessary or usual in the conduct of the business to sell;⁸⁶ but he may not sell the business,⁸⁷ or mortgage it,⁸⁸ or engage in a different business.⁸⁹ He has no im-

⁸⁰ *Watteau v. Fenwick* [1893] 1 Q. B. 346; *Hubbard v. Ten Brook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *National Furnace Co. v. Manufacturing Co.*, 110 Ill. 427; *Banner Tobacco Co. v. Jenlson*, 48 Mich. 459, 12 N. W. 655.

⁸¹ *Cummings v. Sargent*, 9 Metc. (Mass.) 172; *Beecher v. Venn*, 35 Mich. 460.

⁸² He may not contract for supplies to hands, *Carter v. Burnham*, 31 Ark. 212; nor for medical services, *Malone v. Robinson* (Miss.) 12 South. 709. Cf. *Burley v. Kitchell*, 20 N. J. Law, 305.

⁸³ *Stuart v. Adams*, 89 Cal. 367, 26 Pac. 971.

When necessary to operation of mine that provisions be furnished to keeper of boarding house where miners live, superintendent may bind operator for such supplies. *Heald v. Hendy*, 89 Cal. 632, 27 Pac. 67.

⁸⁴ *Taylor v. Labeaune*, 17 Mo. 338; *Roche v. Pennington*, 90 Wis. 107, 62 N. W. 946.

⁸⁵ *Brockway v. Mullin*, 46 N. J. Law, 448, 50 Am. Rep. 442; *Victoria Gold Min. Co. v. Fraser*, 2 Colo. App. 14, 29 Pac. 667; *Fisk v. Light Co.*, 3 Colo. App. 319, 33 Pac. 70.

The burden is on plaintiff to show that the goods are such as the nature of the business justified. *Wallis Tobacco Co. v. Jackson*, 99 Ala. 460, 13 South. 120.

⁸⁶ See *Johnston v. Investment Co.*, 46 Neb. 480, 64 N. W. 1100.

He may sell other personal property. *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775. But see *Holbrook v. Oberne*, 58 Iowa, 324, 9 N. W. 291.

⁸⁷ *Vescelius v. Martin*, 11 Colo. 391, 18 Pac. 338.

⁸⁸ *Despatch Line of Packets v. Manufacturing Co.*, 12 N. H. 205, 228, 37 Am. Dec. 203; *Henson v. Mercantile Co.*, 48 Mo. App. 214.

⁸⁹ *Hazeltine v. Miller*, 44 Me. 177; *Campbell v. Hastings*, 29 Ark. 512.

plied authority to borrow unless the power to borrow is necessarily to be implied from the nature of the business,⁹⁰ and the mere existence of a sudden emergency is not enough to justify borrowing.⁹¹ Subject to the same limitations, he has no implied authority to make negotiable paper.⁹²

Insurance Agent.

It is customary for insurance companies to appoint agents at a distance from the principal place of business of the company for the purpose of soliciting insurance and conducting matters of business between the company and the insured. Sometimes the authority of such agents extends simply to procuring and forwarding applications for insurance to the company for acceptance; sometimes the authority extends to accepting applications, fixing the rate of insurance, filling up, countersigning, and issuing policies which they have received from the company signed by its general agents, collecting premiums, and performing further duties. Insurance agents are frequently inaccurately classified as "local" and "general," but the extent of the territory which is to be field of his agency is no test of an agent's authority within that field.⁹³ In conformity with the fundamental principles of agency, whether the agent is authorized merely to procure and forward applications,⁹⁴ or is authorized to accept appli-

⁹⁰ Perkins v. Boothby, 71 Me. 91; Bickford v. Menier, 107 N. Y. 490, 14 N. E. 438; Heath v. Paul, 81 Wis. 532, 51 N. W. 876; Consolidated Nat. Bank v. Steamship Co., 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85.

⁹¹ Hawtayne v. Bourne, 7 M. & W. 595.

⁹² Temple v. Pomroy, 4 Gray (Mass.) 128; Perkins v. Boothby, 71 Me. 91; Fairly v. Nash, 70 Miss. 193, 12 South. 149; ante, p. 215.

Where the agent is held out as principal, such power is within the apparent authority. Edmunds v. Bushell, L. R. 1 Q. B. 97.

⁹³ Ermentrout v. Insurance Co., 63 Minn. 305, 310, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481.

⁹⁴ Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. Ed. 617; Malleable Iron Works v. Insurance Co., 25 Conn. 465; Woodbury Sav. Bank & Building Ass'n v. Insurance Co., 31 Conn. 517; Brandup v. Insurance Co., 27 Minn. 393, 7 N. W. 735; Kausal v. Insurance Ass'n, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 770.

cations, issue policies, and perform other duties," the delegation of the powers expressly conferred, unless their extent is expressly limited, carries with it by implication authority to do all things which are reasonably necessary or usual to effect the principal powers, and the authority thus *prima facie* to be implied is the apparent authority of the agent in dealing with persons who have not notice of any limitations. Within the scope of his apparent authority the acts of the agent are binding upon the company, and beyond its scope the company is not bound.⁶⁶ Notice of limitations upon the agent's authority may be actual or constructive.⁶⁷ Frequently provisions limiting the authority of the agent are inserted in the policy, and, so far as concerns his authority to bind the company by acts to be performed after the issuance of the policy, such provisions operate as constructive notice to the insured of the limitations imposed, and it is immaterial whether or not he reads the policy or has actual knowledge of the limitations.⁶⁸

⁶⁶ *Pitney v. Insurance Co.*, 65 N. Y. 6; *Ruggles v. Insurance Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166; *Viele v. Insurance Co.*, 26 Iowa, 9, 96 Am. Dec. 83.

⁶⁷ *Bush v. Insurance Co.*, 63 N. Y. 531; *Lohnes v. Insurance Co.*, 121 Mass. 439; *Kyte v. Assurance Co.*, 144 Mass. 48, 10 N. E. 518; *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; *Ermentrout v. Insurance Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481; *Strickland v. Insurance Co.*, 66 Iowa, 466, 23 N. W. 926; *Hall v. Insurance Co.*, 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. Rep. 844.

⁶⁸ *Fleming v. Insurance Co.*, 42 Wis. 616; *Baines v. Ewing*, 4 H. & C. 511.

⁶⁹ *Quinlan v. Insurance Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Walsh v. Insurance Co.*, 73 N. Y. 5; *Cleaver v. Insurance Co.*, 65 Mich. 527, 33 N. W. 660, 8 Am. St. Rep. 908; *Burlington Ins. Co. v. Gibbons*, 48 Kan. 15, 22 Pac. 1010, 19 Am. St. Rep. 118. See, also, *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

Restrictions in the policy upon the agent's power to waive condi-

Bank Cashier.

The cashier of a bank is its chief executive officer. It is customary for him to be intrusted with the funds and securities of the bank, and, directly or through its subordinate officers under his direction, to conduct its financial operations.⁹⁹ His implied authority is very large. "Ordinarily the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the powers necessary for such an officer in the transaction of the legitimate business of banking."¹⁰⁰ Thus, by virtue of his office, he usually has authority to collect debts due the bank;¹⁰¹ to receive payment and give certificates of deposit and other proper vouchers, and when the money is in bank to certify a check to be good;¹⁰² to draw checks and bills upon the funds of the bank deposited elsewhere;¹⁰³ to buy and sell bills of exchange;¹⁰⁴ to indorse and transfer negotiable paper in the regular course of business;¹⁰⁵ as well as to do many other acts necessary or usual in the

tions of the policy cannot be construed to refer to any act or knowledge of the agent that occurred before the policy issued. *Crouse v. Insurance Co.*, 79 Mich. 249, 44 N. W. 496. See, also, *Mutual Ben. Life Ins. Co. v. Robison*, 7 C. C. A. 444, 58 Fed. 723, 22 L. R. A. 325; *Kausal v. Insurance Ass'n*, 31 Minn. 17, 16 N. W. 430. 47 Am. Rep. 776.

There is much conflict as to the construction and effect of such provisions. See *Joyce, Ins.* §§ 430-439.

⁹⁹ *Merchants' Nat. Bank v. Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008.

¹⁰⁰ *West St. Louis Sav. Bank v. Bank*, 95 U. S. 557, 24 L. Ed. 490.

¹⁰¹ *Merchants' Nat. Bank v. Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; *Badger v. Bank*, 26 Me. 428.

¹⁰² *Merchants' Nat. Bank v. Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; *Cooke v. Bank*, 52 N. Y. 96, 11 Am. Rep. 667.

¹⁰³ *Merchants' Nat. Bank v. Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; *Morse, Banks & B.* § 159.

¹⁰⁴ *Fleckner v. Bank*, 8 Wheat. (U. S.) 338, 360, 5 L. Ed. 631; *Wild v. Bank*, 3 Mason (U. S.) 505, Fed. Cas. No. 17,646.

¹⁰⁵ *Wild v. Bank*, 3 Mason (U. S.) 505, Fed. Cas. No. 17,646; *City Bank v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332.

conduct of the business.¹⁰⁸ Within the scope of the authority ordinarily confided to cashiers, as determined by usage, his acts are binding upon the bank, in favor of third persons, notwithstanding unusual restrictions upon his authority, of which they have not notice.¹⁰⁷ Thus if, in disobedience to his instructions, he certifies a check, the bank is bound by the certification, unless the person to whom it is issued has notice that the cashier was forbidden to certify.¹⁰⁸ And if he certifies without funds in bank, the person in whose favor the check is certified being ignorant of the fact, the bank is liable thereon to him or to a subsequent innocent holder.¹⁰⁹ His apparent authority is, of course, confined to transactions for the benefit of the bank, and does not extend to making accommodation paper.¹¹⁰

Shipmaster.

A shipmaster is an agent appointed for the purpose of conducting the voyage on which the ship is engaged, and his implied authority, arising from the nature of his duties and from usage, is very broad.¹¹¹ "The master is a general agent to perform all things relating to the usual employment of his ship, and the authority of such an agent to perform all things usual in the line of business in which he is em-

¹⁰⁸ As to his authority generally, see Morse, Banks & B. §§ 152, 160.

¹⁰⁷ Fleckner v. Bank, 8 Wheat. (U. S.) 360, 5 L. Ed. 631; Minor v. Bank, 1 Pet. (U. S.) 46, 70, 7 L. Ed. 47; Case v. Bank, 100 U. S. 446, 454, 25 L. Ed. 695; Matthews v. Bank, 1 Holmes (U. S.) 396, Fed. Cas. No. 9,296; Cooke v. Bank, 52 N. Y. 96, 11 Am. Rep. 667; City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Clarke Nat. Bank v. Bank, 52 Barb. 592; Settle v. Insurance Co., 7 Mo. 379.

¹⁰⁸ Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; Cooke v. Bank, 52 N. Y. 96, 11 Am. Rep. 667.

¹⁰⁹ Farmers' & Mechanics' Bank v. Bank, 14 N. Y. 623; Id., 16 N. Y. 125, 69 Am. Dec. 678; Meads v. Bank, 25 N. Y. 143, 82 Am. Dec. 331. See, also, cases cited in last note.

¹¹⁰ West St. Louis Sav. Bank v. Bank, 95 U. S. 557, 24 L. Ed. 490.

¹¹¹ Arthur v. Barton, 6 M. & W. 138; Beldon v. Campbell, 6 Ex. 886. See Story, Ag. § 116 et seq.

ployed cannot be limited by any private order or direction not known to the party dealing with him."¹¹³ He is agent of the shipowner, and ordinarily has nothing to do with the cargo except to fulfill, as agent of the shipowner, the contract to carry the cargo to its destination, but in cases of emergency he may act as agent of the owner of the goods.¹¹⁴ For a discussion of the peculiar powers of the master of a ship, the student is referred to the special works upon maritime law.

Factor.

A factor is an agent whose ordinary business is to sell goods of which he is intrusted with possession by his principal for a commission. He is often called a commission merchant or consignee.¹¹⁵ When, in consideration of additional compensation, he guaranties the payment of the price, he is called a *del credere* agent.¹¹⁶ Unless his authority is expressly limited, a factor has implied authority to sell the goods intrusted to him in his own name,¹¹⁷ to sell at such times and for such prices as he thinks best,¹¹⁸ to sell on reasonable credit,¹¹⁹ to warrant the goods if it is usual to

¹¹³ Smith's Mercantile Law, 59, quoted in *Grant v. Norway*, 10 C. B. 665.

As to his power to bind the shipowner by a bill of lading for goods not on board, ante, 200.

¹¹⁴ Ante, p. 41.

¹¹⁵ Story, Ag. §§ 33, 34.

Where, in a voyage, he accompanies the cargo, with authority to sell it and to purchase a return cargo, he is termed a "supercargo."

¹¹⁶ Post, p. 437.

¹¹⁷ *Baring v. Corrie*, 2 B. & Ald. 137; *Smart v. Sanders*, 3 C. B. 380; *Ex parte Dixon*, 4 Ch. D. 133; *Graham v. Duckwall*, 8 Bush (Ky.) 12. See *Bowstead*, Dig. Ag. 68.

¹¹⁸ *Smart v. Sanders*, 3 C. B. 380.

¹¹⁹ *Scott v. Surman*, Willes, 406; *Houghton v. Matthews*, 3 B. & P. 489; *Goodenow v. Tyler*, 7 Mass. 38, 5 Am. Dec. 22; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Burton v. Goodspeed*, 69 Ill. 237.

On a sale for credit he may take a bill or note in payment. *Goode-*

warrant that class of goods,¹¹⁹ and to receive payment.¹²⁰

A factor has no implied authority to delegate his authority;¹²¹ to barter;¹²² or to pledge,¹²³ unless for charges on the goods themselves,¹²⁴ although in many jurisdictions in this respect changes have been made by the factors' acts.¹²⁵ Like other agents, a factor is bound to exercise skill, care, and diligence, to exercise good faith, to account, and to obey the instructions of his principal.¹²⁶ He may depart from his instructions, however, if such a course is justified by the occurrence of an unforeseen emergency, or if obedience would impair his security for advances.¹²⁷ As between himself and third persons, the principal is bound by the acts of the factor within the scope of the authority which is usually confided to

now *v. Tyler*, *supra*; *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54.

¹¹⁹ *Randall v. Kehler*, 60 Me. 37, 11 Am. Rep. 169 (semble). Cf. *Argersinger v. Macnaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687. See, also, *Dingle v. Hare*, 7 C. B. (N. S.) 145; *Schnehardt v. Allens*, 1 Wall. (U. S.) 359, 17 L. Ed. 642. Ante, p. 207.

¹²⁰ *Drinkwater v. Goodwin*, Cowp. 251; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Rice v. Groffmann*, 56 Mo. 434.

¹²¹ *Cochran v. Irlam*, Cowp. 251; *Solly v. Rathbone*, 2 M. & S. 298; *Warner v. Martin*, 11 How. (U. S.) 200, 13 L. Ed. 667. Unless justified by usage, *Trueman v. Loder*, 11 Ad. & E. 589; *Warner v. Martin*, *supra*. Ante, p. 207.

¹²² *Guerreiro v. Pelle*, 6 B. & Ald. 616; *Wing v. Neal* (Me.) 2 Atl. 881. Ante, p. 207.

¹²³ *Paterson v. Tash*, Str. 1178; *Martini v. Coles*, 1 M. & S. 140; *Guilchard v. Morgan*, 4 Moore, 36; *Warner v. Martin*, 11 How. (U. S.) 209, 13 L. Ed. 667; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573; *Kinder v. Shaw*, 2 Mass. 397; *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362; *Rodriguez v. Hefferman*, 5 Johns. Ch. (N. Y.) 417; *Gray v. Agnew*, 95 Ill. 315; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196.

¹²⁴ *Evans v. Potter*, 2 Gall. 12, Fed. Cas. No. 4,569 (duties). Accepting bills drawn by the principal to be provided for out of proceeds does not authorize pledging the goods. *Gill v. Kymer*, 5 Moore, 503; *Fielding v. Kymer*, 2 B. & B. 639. But see *Boyce v. Bank* (C. C.) 22 Fed. 53.

¹²⁵ Post, pp. 315, 317.

¹²⁶ Post, p. 396.

¹²⁷ Post, p. 403.

such an agent, unless they have notice of special instructions imposing restrictions.¹²⁸

Broker.

A broker is an agent whose ordinary business is to negotiate or make contracts with third persons on behalf of persons by whom he may be employed, for a commission. He is a middleman or intermediate negotiator between the parties.¹²⁹ The implied authority of a broker depends largely upon the kind of brokerage in which he is engaged, the usages in the different species of brokerage agencies being necessarily diverse. Thus, a broker has, as a rule, no authority to contract in his own name¹³⁰ or to delegate his authority,¹³¹ but, in conformity with the usage of the stock exchange, a stock broker has in many transactions implied authority to buy and sell in his own name¹³² and to act by a substitute.¹³³ When a broker is employed to buy or sell, he differs from a factor, in that he is not intrusted with possession. He has therefore no implied authority to sell in his own name or to receive payment.¹³⁴ He has no implied authority to sell on credit unless there is usage to that effect.¹³⁵ It seems that he has implied authority to warrant the goods if in the sale of such goods a warranty is usual.¹³⁶ He has implied

¹²⁸ *Ex parte Dixon*, 4 Ch. D. 133; *Pickering v. Busk*, 15 East, 38; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45.

¹²⁹ See Story, Ag. §§ 28-32.

¹³⁰ *Baring v. Corrie*, 2 B. & Ald. 137; *Saladin v. Mitchell*, 45 Ill. 79.

¹³¹ *Henderson v. Barnwell*, 1 Y. & J. 387; *Cochran v. Irlam*, 2 M. & S. 301.

¹³² *Markham v. Jaudon*, 41 N. Y. 239; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842.

¹³³ *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

¹³⁴ *Baring v. Corrie*, 2 B. & Ald. 137; *Higgins v. Moore*, 34 N. Y. 417; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Saladin v. Mitchell*, 45 Ill. 79.

¹³⁵ *Wiltshire v. Sims*, 1 Camp. 258; *Boorman v. Brown*, 3 Q. B. 511.

¹³⁶ *Schuchardt v. Allens*, 1 Wall. (U. S.) 359, 17 L. Ed. 642; *The*

authority to make a note or memorandum to satisfy the statute of frauds.¹³⁷ Within the scope of the authority ordinarily confided to a broker employed to perform the business delegated to him, the acts of a broker are binding upon his principal in favor of persons dealing with him in ignorance of unusual limitations.¹³⁸

Auctioneer.

An auctioneer is an agent whose ordinary business is to sell goods or other property to the highest bidder at public sale, for a commission. Although he is the agent of the seller, and is exclusively his agent until the knocking down of the goods, he is deemed to be the agent of, and has implied authority to sign a note or memorandum on behalf of, both seller and buyer to satisfy the statute of frauds.¹³⁹ His agency extends only to making sale, and ceases as soon as it is made.¹⁴⁰ The principal may, of course, direct the man-

Monte Allegre, 9 Wheat. (U. S.) 616, 644, 6 L. Ed. 174; Andrews v. Kneeland, 6 Cow. (N. Y.) 354. See, also, ante, p. 207. But see Dodd v. Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726, where it was held that a merchandise broker can have no implied authority from the usage of trade to warrant goods to be merchantable, and that evidence to prove such usage is inadmissible.

¹³⁷ Parton v. Crofts, 16 C. B. (N. S.) 11; Thompson v. Gardner, 1 C. P. D. 777.

¹³⁸ Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358.

¹³⁹ Simon v. Metivier, 1 Wm. Bl. 599; Hinde v. Whitehouse, 7 East, 558; Morton v. Deau, 13 Metc. (Mass.) 385; McComb v. Wright, 4 Johns. Ch. (N. Y.) 659.

"The technical ground is that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers on the auctioneer or his clerk authority to sign his name." Per Shaw, C. J., in Gill v. Bicknell, 2 Cush. (Mass.) 355. See Tiffany, Sales, 77.

¹⁴⁰ Seton v. Slade, 7 Ves. 276. The authority to sign the memorandum ends with the sale. Horton v. McCarty, 53 Me. 394; Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723. A recent English case holds, however, that the vendee cannot revoke the auc-

ner and terms of sale, and it is the duty of the auctioneer to obey his instructions.¹⁴¹ The conditions of sale are ordinarily published or announced at the time of sale, and when the conditions as stated are in conformity with the instructions of the principal they are binding upon seller and buyer.¹⁴² Evidence of verbal declarations on the part of the auctioneer to vary the printed conditions of sale is inadmissible.¹⁴³ When the principal places some unusual limitation upon the authority of the auctioneer, who fails to give notice of the limitation and sells in disregard of his instructions, it would seem that the sale, being within the apparent authority of the auctioneer, would be binding upon the principal; but it has been held that if the auctioneer is not authorized to sell for less than a certain amount and sells for less, although he does not give notice of the limitation, the principal is not bound by the sale.¹⁴⁴ The implied authority of an auctioneer is necessarily narrow. He has implied authority to receive payment of so much of the price as by the terms of sale is to be paid down,¹⁴⁵ and in the case of personal property may maintain an action in his own name for the price or for the goods, if the conditions are not complied with; this doctrine standing upon his right to receive, and his responsibility to the principal for, the price, and his lien upon the

tioneer's authority to sign. *Van Praagh v. Everidge* [1902] 2 Ch. 266.

¹⁴¹ *Williams v. Poor*, 3 Cranch, C. C. (U. S.) 251, Fed. Cas. No. 17,732; *Steele v. Ellmaker*, 11 Serg. & R. (Pa.) 86.

¹⁴² *Sykes v. Gilles*, 5 M. & W. 645; *Farr v. John*, 23 Iowa, 286. 92 Am. Dec. 426; *Morgan v. East*, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558.

¹⁴³ *Gunnis v. Erhart*, 1 H. Bl. 290; *Shelton v. Livius*, 2 O. & J. 411.

¹⁴⁴ *Bush v. Cole*, 28 N. Y. 261. 84 Am. Dec. 343. The court said that the auctioneers "were constituted agents for a particular purpose and under a limited and circumscribed authority, and could not bind their principals beyond their authority"—apparently resting the decision upon the ground that the agency was special.

¹⁴⁵ *Williams v. Millington*, 1 H. Bl. 81; *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353. Cf. *Coppin v. Walker*, 7 Taunt. 237.

goods for his commission.¹⁴⁶ An auctioneer has no implied authority to sell at private sale;¹⁴⁷ to sell on credit;¹⁴⁸ or to take a bill or note or check in payment when it is provided that the whole or any part of the price is to be paid down;¹⁴⁹ to warrant the goods;¹⁵⁰ to deliver the goods without payment or to allow a set-off;¹⁵¹ to rescind a sale once made;¹⁵² or to delegate his authority.¹⁵³

Attorney at Law.

An attorney at law is an agent whose ordinary business is to conduct suits and controversies in courts of law and other judicial tribunals. He is an officer of court, and must be duly qualified by the court in which he appears. In England the business of litigation is divided between barristers, or counsel, who represent their clients when speaking for them in court, and solicitors, who represent them throughout the cause; but in this country these functions

¹⁴⁶ *Hulse v. Young*, 16 Johns. 1; *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243; *Flanigan v. Crull*, 53 Ill. 352, and cases cited in preceding note.

"In case of real estate, he can have no such special property, and would not ordinarily be held entitled to receive the price. But when the terms * * * contemplate the payment of a deposit * * * he may receive and receipt for the deposit," and, it seems, may sue for it. Per Wells, J., *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353.

¹⁴⁷ *Daniel v. Adams*, Ambl. 495; *Marsh v. Jelf*, 3 F. & F. 234.

¹⁴⁸ *Williams v. Evans*, L. R. 1 Q. B. 352; *Sykes v. Giles*, 5 M. & W. 695.

¹⁴⁹ *Williams v. Evans*, L. R. 1 Q. B. 352; *Sykes v. Giles*, 5 M. & W. 695; *Broughton v. Silloway*, 114 Mass. 71. May accept check, if usage, *Farrer v. Lacy*, 25 Ch. D. 636.

¹⁵⁰ *Payne v. Leconfield*, 51 L. J. Q. B. 642; *Blood v. French*, 9 Gray (Mass.) 197.

¹⁵¹ *Brown v. Staton*, 2 Chit. 353.

¹⁵² *Nelson v. Albridge*, 2 Starkie, 435; *Bolnest v. Leigneux*, 2 Rich. Law (S. C.) 464.

¹⁵³ *Com. v. Harnden*, 10 Pick. (Mass.) 482; *Stone v. State*, 12 Mo. 400.

are usually exercised by one and the same person.¹⁵⁴ Broadly speaking, an attorney has implied authority "to do all acts, in or out of court, necessary or incidental to the prosecution or management of the suit, and which affect the remedy only, and not the cause of action."¹⁵⁵ It is impossible, however, by a general statement to indicate the line between the acts which he may and may not do. Thus, for example, he may make admissions of fact;¹⁵⁶ submit a cause to arbitration;¹⁵⁷ stipulate that the judgment shall be the same as in another pending action;¹⁵⁸ dismiss or continue the action;¹⁵⁹ or release an attachment before judgment.¹⁶⁰ On the other hand, he may not confess judgment;¹⁶¹ release the cause of action;¹⁶² release property of the defendant from the lien of a judgment or execution;¹⁶³ or, according to the weight of authority in the United States, compromise the claim.¹⁶⁴

¹⁵⁴ Wright, Prin. & Ag. 101. As to implied authority of counsel and solicitors, see Bowstead, Dig. Ag. 72-74.

¹⁵⁵ Moulton v. Bowker, 115 Mass. 40, 15 Am. Rep. 72, per Gray, C. J. See, also, Halliday v. Stuart, 151 U. S. 229, 14 Sup. Ct. 302, 38 L. Ed. 141.

¹⁵⁶ Lewis v. Sumner, 13 Metc. (Mass.) 260; Pike v. Emerson, 5 N. H. 303, 22 Am. Dec. 468; Farmers' Bank v. Sprigg, 11 Md. 380.

¹⁵⁷ Holker v. Parker, 7 Cranch (U. S.) 436, 3 L. Ed. 396; Inhabitants of Buckland v. Inhabitants of Conway, 16 Mass. 396; Brooks v. Town of New Durham, 55 N. H. 559; Sargeant v. Clark, 108 Pa. 588.

¹⁵⁸ North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277.

¹⁵⁹ Gaillard v. Smart, 6 Cow. (N. Y.) 385; Barrett v. Railroad Co., 45 N. Y. 628; Rogers v. Greenwood, 14 Minn. 333 (Gil. 256).

¹⁶⁰ Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Benson v. Carr, 73 Me. 76.

¹⁶¹ Wadhams v. Gay, 73 Ill. 415; Pfister v. Wade, 69 Cal. 133, 10 Pac. 369.

¹⁶² Mandeville v. Reynolds, 68 N. Y. 528; Wadhams v. Gay, 73 Ill. 415.

¹⁶³ Benedict v. Smith, 10 Paige (N. Y.) 126; Phillips v. Dobbins, 56 Ga. 617.

¹⁶⁴ Mandeville v. Reynolds, 68 N. Y. 528; Granger v. Batchelder,

**CONTRACT INDUCED BY COLLUSION OF OTHER PARTY
AND AGENT.**

49. A contract made by an agent under the influence of bribery, or, to the knowledge of the other party, in fraud of the principal, is voidable by the principal.¹

An agent cannot be allowed to put himself into a position in which his interest and his duty will be in conflict;² and, if a person who contracts with an agent so deals with him as to give the agent an interest against the principal, the latter, on discovering the fact, may rescind the contract, notwithstanding that it was within the scope of the agent's authority. Thus, a gratuity given, or promise of commission or reward made, to an agent for the purpose of influencing the execution of the agency, vitiates a contract subsequently made by him, as being presumptively made under that influence.³ It is enough that a gratuity is given in order to

54 Vt. 248, 41 Am. Rep. 846; Maddox v. Bevan, 39 Md. 485; Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; Wetherbee v. Fitch, 117 Ill. 67, 7 N. E. 513; Jones v. Inness, 32 Kan. 177, 4 Pac. 95; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647.

It is otherwise in England. Prestwick v. Poley, 18 O. B. (N. S.) 806. Accord: Bonney v. Morrill, 57 Me. 368.

"Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised in the case." Holker v. Parker, 7 Cranch (U. S.) 436, 452, 3 L. Ed. 396, per Marshall, C. J. Cf. Jeffries v. Insurance Co., 110 U. S. 303, 4 Sup. Ct. 8, 28 L. Ed. 150.

§ 49. ¹ Bowstead, Dig. Ag. art. 105.

² Post, p. 415.

³ Panama Tel. Co. v. India R. Co., 1 L. R. 10 Ch. 515; Odessa Tramways Co. v. Mendel, 8 Ch. D. 235; City of Findlay v. Pertz, 13 C. C. A. 559, 66 Fed. 427, 29 L. R. A. 188; Alger v. Keith, 44 O. C. A. 371, 105 Fed. 105; Young v. Hughes, 32 N. J. Eq. 372; United States Rolling Stock Co. v. Railroad Co., 34 Ohio St. 450-460, 32 Am. Rep. 380; Yeoman v. Lasley, 40 Ohio St. 190.

influence the agent generally, and the contract is voidable although the gratuity was not given in relation to the particular contract.⁴ The principal may, at his option, rescind; or he may stand by the contract, and recover from the agent the amount of the bribe which he has received, and may also recover from the agent and the other party, jointly and severally, any damages which he has sustained by having entered into the contract.⁵ In conformity with the general principle, if an agent employed to sell, sells ostensibly to a third person, but really to that person and himself,⁶ or if in making the sale the agent withholds information good faith requires him to communicate, and the purchaser is cognizant of the fraud,⁷ the sale is voidable, at the option of the principal.

⁴ *Smith v. Sorby*, 3 Q. B. D. 552, n.

⁵ *Post*, p. 223.

⁶ *Ex parte Huth*, Mont. & C. 667. See, also, *Donovan v. Campton*, 29 C. A. 30, 85 Fed. 71. *Post*, p. 416.

⁷ *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

CHAPTER IX.

LIABILITY OF PRINCIPAL TO THIRD PERSON— CONTRACT (CONTINUED).

- 50. Liability upon Contract—Undisclosed Principal—In General.
- 51. Parol Evidence.
- 52. Liability of Undisclosed Principal.
- 53. Election to Hold Agent.
- 54. Settlement with Agent.
- 55. Contract under Seal.
- 56. Negotiable Instrument.

LIABILITY UPON CONTRACT—UNDISCLOSED PRINCIPAL —IN GENERAL.

50. A principal may sue or be sued upon a contract (not under seal or a negotiable instrument) made on his behalf by his agent, although the existence of the principal was undisclosed, and the other party contracted in the belief that he was dealing with the agent as principal.

SAME—PAROL EVIDENCE.

51. When an agent enters into a contract in writing (not under seal or a negotiable instrument) in his own name, parol evidence is admissible to show that he acted as agent for an undisclosed principal in making the contract, so as to charge the principal or entitle him to sue upon the contract.

In General.

The liability of the principal for contracts duly made on his behalf by his agent, where the agency is disclosed and the other party intends to contract with the principal, is in accordance with the ordinary principles of contract. The rule that the principal is bound by the contracts made by his agent on his behalf, where the principal, and even the agency, is undisclosed, and may not only be sued but may sue on the

contract, is an anomaly introduced by agency into the sphere of contract, which is difficult of explanation. It is fundamental that no one but the parties to a contract can be bound by it or entitled to sue under it. Where an agent contracts in the name of his principal, becoming his mouthpiece or medium of communication, and the other party intentionally contracts with the principal, there is no difficulty in holding that the principal is a party.¹ But where the agency is not disclosed, and the other party intends to contract solely with the agent, whom he believes to be acting on his own behalf, to allow the principal, whose existence is undisclosed, to be treated as such, is to introduce a third party into the contract. If the principal has received the benefit of the contract, as in the case of a contract of sale where the goods purchased by the agent have come to the use of the principal, it is not strange that the courts should have found some fiction to hold him liable to pay for them in an action of contract; and it was in fact in cases of this nature that the doctrine of the liability of an undisclosed principal had its inception. It is at a later date that we find the liability of the other party to the undisclosed principal expressly recognized, and the rule finally extended to other contracts. The rule, whatever its origin, is an illustration of the identification of principal and agent ² which runs through this branch of the law. As we shall see, the other party is not debarred of his right of action against the person with whom he intended to contract, but he has his election to sue the real principal; and the principal, as well as the agent, may sue upon the contract. "If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule that whenever an express contract is made an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made."³ We are con-

§§ 50-51. ¹Anson, Contr. pt. 3, c. 1; Clark, Contr. 508-510.

² 5 Harvard Law Rev. 1-6.

³ Cothay v. Fennell, 10 B. & C. 671.

cerned at present with the second branch of the rule—the liability of the undisclosed principal.

Contract in Writing—Parol Evidence.

It might also be expected that the so-called parol evidence rule would render impossible a suit by or against an undisclosed principal when the contract is in writing and purports to be made with or by the agent on his own behalf. Certainly the effect of such evidence appears to be to vary the terms of the written instrument, to which the principal does not purport to be a party, yet this view has not prevailed. "There is no doubt," said Parke, B., "that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but it shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."⁴

Whatever the merits of the reasoning, the rule is firmly established, both in respect to agreements required by the statute of frauds⁵ to be in writing and those which are not.⁶ But, as intimated in the passage quoted, the converse of the proposition does not hold true, and an agent so con-

⁴ *Higgins v. Senior*, 8 M. & W. 834.

⁵ *Bateman v. Phillips*, 15 East, 272; *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 Ad. & E. 589; *Lerned v. Johns*, 9 Allen (Mass.) 419; *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

⁶ *Ford v. Williams*, 21 How. (U. S.) 287, 16 L. Ed. 36; *Darrow v. Produce Co. (C. C.)* 57 Fed. 463; *Huntington v. Knox*, 7 Cush. (Mass.)

tracting cannot show by parol that it was not the intention of the parties to bind him personally, and so relieve himself from liability; for that, it is said, would be to allow parol evidence to contradict the written instrument.⁷ Nor is the principal in every case allowed to introduce evidence to show that he was the real principal, for the instrument may be so drawn that the effect of the evidence would be to vary its terms. Thus, where an agent executed a charter party in his own name, and was described therein as the owner of the vessel, it was held that the real owner could not show that the agent contracted on her behalf, so as to maintain an action on the charter party, because such evidence would contradict the statement that the agent was owner.⁸ The rule that where the contract is made in the name of the agent parol evidence is admissible to charge the real principal applies also if the name of the principal is disclosed at the time, although the acceptance of the writing in that form with knowledge of the facts may be evidence of an election to give credit to the agent and to resort solely to him as

374; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Coleman v. Bank*, 58 N. Y. 394; *Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314; and cases cited in preceding note.

"Among the ingenious arguments * * * there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, whose name is inserted in it, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract is signed by his own hand or by that of an agent, are inquiries not different in their nature from the question, who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." Per Lord Denman, in *Trueman v. Loder*, 11 Ad. & E. 589.

⁷ *Higgins v. Senior*, 8 M. & W. 834; post, p. 356.

⁸ *Humble v. Hunter*, 12 Q. B. 310.

principal.⁹ The rule that parol evidence is admissible to show who was the real principal does not apply to instruments under seal¹⁰ or to negotiable instruments.¹¹

LIABILITY OF UNDISCLOSED PRINCIPAL.

52. Subject to the qualifications and exceptions stated in sections 53-56, an undisclosed principal is liable to the other party upon a contract made on his behalf by his agent acting within the scope of his actual authority, or within the scope of the authority usually confided to an agent employed to transact the business delegated.

SAME—ELECTION TO HOLD AGENT.

53. The principal is no longer liable when the other party, after discovery of the real principal, has elected to hold or give exclusive credit to the agent.

SAME—SETTLEMENT WITH AGENT.

54. The principal is no longer liable when, before being called upon by the other party for performance, he has in good faith settled with the agent, or made such change in the state of the account between himself and the agent that he would be prejudiced if compelled to settle with the other party [provided that he made such settlement or change of account in the belief, reasonably induced by the conduct of the other party, that the agent had already settled with him or that he had elected to give exclusive credit to the agent].¹

SAME—CONTRACT UNDER SEAL.

55. An undisclosed principal is not liable upon a deed or other instrument under seal executed on his behalf.

⁹ *Calder v. Dobell*, L. R. 6 C. P. 486; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314. Contra, *Chandler v. Coe*, 54 N. H. 561.

¹⁰ Post, p. 240.

¹¹ Post, pp. 243, 337.

§§ 52-56. ¹ As to the qualification made by the proviso, post, pp. 244, 332.

SAME—NEGOTIABLE INSTRUMENT.

56. An undisclosed principal is not liable upon a negotiable instrument made on his behalf.

Liability of Undisclosed Principal.

An undisclosed principal is liable upon contracts made by his agent acting within the scope of the authority conferred upon him. The other party, upon discovering that the person with whom he dealt as principal was in fact the agent of another, may sue the principal;³ and this, whether the principal has had the benefit of the contract, as in the case of a sale of goods of which he has enjoyed the use,⁴ or whether the contract is executory.⁵ And the rule is the same if the existence of the agency is disclosed, but the name of the principal is undisclosed.⁶

It might well be expected that the liability of an undisclosed principal would be confined to cases where the contract was within the actual authority of the agent, and would not be extended to cases where the contract, although within the ordinary authority of an agent to whom the particular business has been delegated, is in violation of his special

³ Thomson v. Davenport, 9 B. & C. 78; Levitt v. Hamblet [1901] 2 Q. B. 53 (customer of stockbroker who buys shares in accordance with regulations of stock exchange in his own name); Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54; Schendel v. Stevenson, 153 Mass. 351, 26 N. E. 689; Upton v. Gray, 2 Me. 373; Meeker v. Claghorn, 44 N. Y. 349; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Waddill v. Seabee, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766; Lamb v. Thompson, 31 Neb. 448, 48 N. W. 58; Edwards v. Gilde-meister, 61 Kan. 141, 59 Pac. 259; Belt v. Power Co., 24 Wash. 387, 64 Pac. 525; Lindeke Land Co. v. Levy, 76 Minn. 364, 79 N. W. 314; Simmons Hardware Co. v. Todd, 79 Miss. 163, 29 South. 851.

⁴ Cases cited in preceding note.

⁵ Episcopal Church v. Wiley, 2 Hill, Eq. (S. C.) 584, 30 Am. Dec. 386; Violet v. Powell, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548. See, also, Schmaltz v. Avery, 16 Q. B. 655; Calder v. Dobell, L. R. 6 C. P. 486.

⁶ Thompson v. Davenport, 15 B. & C. 78.

instructions; in other words, that the rule of so-called "apparent" or "ostensible" authority could have no application. But, as has been explained, [the latter rule rests upon a doctrine of agency which is broader than estoppel, and which renders the principal liable, notwithstanding that the agency is unknown to the other party, provided the contract is a usual one to be made by an agent employed in that capacity.*] Thus, where the defendants carried on the business of a beer house by means of an agent, who conducted it in his own name, it was held that they were liable to the plaintiff for cigars and other articles such as would usually be supplied to and dealt in at such an establishment, supplied to the agent, although the plaintiff gave credit only to him, and he had been forbidden to buy such articles on credit. "Once it is established," said Wills, J., "that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority, which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or, at least, in every case where the fact of there being a principal was undisclosed, the secret limitation of the authority would prevail and defeat the action of the person dealing with the agent, and then discovering that he was an agent and had a principal. But in case of a dormant partner it is clear law that no limitation as between the dormant and active partner will avail the dormant partner as to things within the ordinary

* *Watteau v. Fenwick* [1893] 1 Q. B. 346. See, also, *Hubbard v. Tenbrook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *Hatch v. Taylor*, 10 N. H. 538. Cf. *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *Ex parte Dixon*, 4 Ch. D. 133.

authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion."⁷

Election to Resort to Agent.

Where an agent makes a contract in his own name, without disclosing the fact that he is acting for a principal, the other party, on discovering the principal, may resort to the principal or to the agent, at his election.⁸ And the same right of election exists upon discovering the name of the principal, where the name, but not the existence of an agency, is undisclosed at the time the contract is made.⁹ When, however, the other party has once, with knowledge of all the facts, elected to hold the agent, he is irrevocably bound by the election, and cannot afterwards resort to the principal.¹⁰ What constitutes an election is a question of fact for the jury, though the evidence of an election may be so conclusive as to preclude any other finding.¹¹ It has been held in England and Massachusetts that the recovery of judgment against the agent is conclusive evidence of an election to resort to him;¹² but in other jurisdictions it has been held

⁷ *Watteau v. Fenwick* [1893] 1 Q. B. 346.

⁸ *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Kingsley v. Davis*, 104 Mass. 178; *Elliott v. Bodine*, 59 N. J. Law, 567, 36 Atl. 1038; *Yates v. Repetto*, 65 N. J. Law, 294, 47 Atl. 632.

He cannot divide the claim and hold each for a part. *Booth v. Barron*, 29 App. Div. 66, 51 N. Y. Supp. 391. See, also, cases cited ante, p. 2, note.

⁹ *Patterson v. Gaudesqui*, 9 B. & C. 78; *Nelson v. Powell*, 3 Doug. 410; *Thomson v. Davenport*, 9 B. & C. 78; *Raymond v. Crown & Eagle Mills*, 2 Metc. (Mass.) 319; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174.

¹⁰ *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Kingsley v. Davis*, 104 Mass. 178.

¹¹ *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Calder v. Dobell*, L. R. 6 C. P. 486.

¹² *Priestly v. Fernle*, 3 H. & C. 977; *Kingsley v. Davis*, 104 Mass. 178. See, also, *Kendall v. Hamilton*, 4 App. Cas. 504, 515. See, also, *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582.

that the principal is not discharged by a judgment without satisfaction of it.¹³ Merely bringing suit against the agent¹⁴ or filing a claim against his estate in bankruptcy¹⁵ is not conclusive, though it may, with other facts, be evidence of an election. It seems that the right to hold the principal upon his discovery must be exercised within a reasonable time, or it will be deemed to be waived.¹⁶

To constitute an election, the other party must have knowledge not merely of the agency, but as to who is the principal; for although the other party at the time of the contract knows that he is dealing with an agent, if he does not know whose agent he is he has not the power of choosing between them, and consequently the same rule applies as if he did not know he was an agent at all. Therefore, under such circumstances, and before discovering who the principal is, he does not make an election by taking the agent's note,¹⁷ or charging the goods to him,¹⁸ or sending a statement made out in his name.¹⁹

¹³ *Beymer v. Bonsall*, 79 Pa. 298; *Brown v. Reiman*, 48 App. Div. 295, 62 N. Y. Supp. 663. Cf. *Maple v. Railroad Co.*, 40 Ohio St. 313, 48 Am. Rep. 685. They may be sued jointly. *McLean v. Sexton*, 44 App. Div. 520, 60 N. Y. Supp. 871.

¹⁴ *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Ferry v. Moore*, 18 Ill. App. 135; *Steele-Smith Grocery Co. v. Potthast*, 109 Iowa, 413, 80 N. W. 519.

¹⁵ *Curtis v. Williamson*, L. R. 10 Q. B. 57.

¹⁶ *Smethhurst v. Mitchell*, 1 E. & E. 622. See, also, *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Irvine v. Watson*, 5 Q. B. D. 623, 628. But see *Davison v. Donaldson*, 9 Q. B. Div. 623.

¹⁷ *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Harper v. Bank*, 54 Ohio St. 425, 44 N. E. 97. Taking the agent's note with knowledge and without taking steps to hold the principal discharges him. *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; *Perkins v. Cady*, 111 Mass. 318.

¹⁸ *Raymond v. Crown & Eagle Mills*, 2 Metc. (Mass.) 319.

¹⁹ *Henderson v. Mayhew*, 2 Gill (Md.) 393, 41 Am. Dec. 484.

Settlement with Agent—State of Account.

While the other party to the contract may, as a rule, upon discovering the existence of a principal, resort to him for performance of the contract, it is obvious that the strict application of the rule will result in hardship, if not injustice, to the principal if he has in the meantime settled with the agent and is compelled again to settle with the other party. The cases are in conflict as to whether settlement with the agent under such circumstances is a defense when the principal is subsequently called upon by the other party for performance, or whether it is a defense only provided the principal has made the settlement in the belief, induced by the words or conduct of the other party, that a settlement has already been made by the agent; in other words, whether or not the defense rests upon the ground of estoppel. The question usually arises where a contract of purchase has been made on behalf of an undisclosed principal, who when called upon by the seller for payment has already paid the agent for the goods.

In *Thomas v. Davenport* ²⁰ the judges gave expression to certain dicta, the correctness of which has been the subject of much subsequent discussion. "I take it to be the general rule," said Lord Tenterden, "that if a person sells goods (supposing at the time he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification: that the state of the account between the principal and the agent is not altered to the prejudice of the principal." And Bailey, J., with more elaboration, said: "If the agent does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification: that the principal shall not be prejudiced by being made per-

²⁰ 9 B. & C. 78 (1829).

sonally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

In *Heald v. Kenworthy*,²¹ however, the foregoing dicta were disapproved, and Parke, B., said: "The expression 'make it unjust,' is very vague; but, if rightly understood, what the learned judge said is, no doubt, true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent on the faith that the agent and the seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. * * * I think that there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." The reasoning is, in short, that the principal, having originally authorized his agent to create a debt, cannot be discharged from it except by payment, unless the seller has estopped himself by his conduct from enforcing it against the principal. In this case it did not distinctly appear that the seller was ignorant of the existence of a principal, although the language of the judges is broad enough to cover the case where the agency is undisclosed as well as the case where merely the name of the principal is undisclosed.

In *Armstrong v. Stokes*,²² however, it was held that where the seller sells the goods to the agent, supposing at the time he is dealing with him as principal, and ignorant of the existence of any agency, payment by the principal to

²¹ 10 Ex. 739 (1855).

²² L. R. 7 Q. B. 598 (1872).

the agent is a defense notwithstanding the absence of facts creating an estoppel against the seller; the court thus giving preference to the earlier statement of the exception, while disclaiming to decide whether it would apply if the agency were avowed, but the principal unnamed. Finally, in *Irvine v. Watson*,²² which was a case where the existence of the agency, but not the name of the principal, was disclosed to the seller, the statement of the exception as made by Parke, B., was approved, and it was held that payment by the principal in good faith to the broker was no defense to an action by the seller for the price. In this case the facts did not render it necessary to pass upon the correctness of the decision in *Armstrong v. Stokes*, the court reserving the right to reconsider that case should it arise again; but the distinction there taken between the case of an undisclosed agency and that of a disclosed agency, where the name of the principal is undisclosed, was disapproved.

The result of the decisions in England is, therefore, that in the latter case, and probably in both cases, settlement with the agent on the part of the principal is a defense only when he has been induced, by words or conduct of the

²² 5 Q. B. D. 414 (1880). See, also, *Davison v. Donaldson*, 9 Q. B. D. 623.

In *Irvine v. Watson*, 5 Q. B. D. 623, a broker, employed by defendants to buy oil, bought from plaintiffs, telling them that he was acting for a principal, the terms being that the oil should be paid for by cash "on or before delivery." Plaintiffs delivered without payment, and defendants, not knowing that the broker had not paid, in good faith paid him. The broker soon after became insolvent. In an action for the price, it appeared that it was not the invariable custom of the oil trade to insist on prepayment in such sales, and it was held that, in the absence of such custom, the mere omission to insist on prepayment was not such conduct as would reasonably induce defendants to believe that the broker had paid for the oil, and that they were hence liable for the price. Whether mere delay on the part of the seller might not, in special cases, be sufficiently misleading conduct, as amounting to a representation that he had been paid, *quære*. See remarks of Jessel, M. R., in *Davison v. Donaldson*, 9 Q. B. D., at page 628.

other party, sufficient to create an estoppel, to believe that a settlement has already been made by the agent, or, it would seem, to believe that the other party has elected to give exclusive credit to the agent,²⁴ and has himself settled with the agent in that belief.

In this country the question has been little considered, and the earlier statement of the exception has generally been approved without discussion.²⁵

Contract under Seal.

While an unnamed principal may sue or be sued upon a simple contract,²⁶ except in the case of commercial paper,²⁷ it is a technical rule of the common law that no one who is not named in or described as a party to an instrument under seal can maintain an action or be charged upon it. If, therefore, a deed or other instrument to whose validity a seal is essential is made by an agent, it must be made in the name

²⁴ "It surely must, at all events, be the law that in the case of sale of goods to a broker the principal known or unknown cannot, by paying or settling before the time of payment comes with his own agent, relieve himself of responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and, if so, within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit; such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that, though the debt is not paid, the seller elects to abandon his recourse to the principal and to look to the agent alone." Per Bowen, J., in *Irvine v. Watson*, 5 Q. B. D. 102. See, also, remarks of Bramwell, L. J., and Brett, L. J., commenting upon *Armstrong v. Stokes*, in *Irvine v. Watson*, 5 Q. B. D. 414. And see Bowstead, Dig. Ag. art. 93.

²⁵ *Fradley v. Hyland* (C. C.) 37 Fed. 49, 2 L. R. A. 749; *Thomas v. Atkinson*, 38 Ind. 248; *Laing v. Butler*, 37 Hun (N. Y.) 144; *Knapp v. Simon*, 96 N. Y. 284, 289; *Ketchum v. Verdell*, 42 Ga. 534. Contra, *York County Bank v. Stein*, 24 Md. 447. For a review of the decisions, see 23 Am. Law Rev. 565.

²⁶ Ante, p. 231; post, p. 303.

²⁷ Post, pp. 244, 308, 336.

of the principal, or he will not be bound.²⁸ It follows that the doctrine of undisclosed principal can have no application to this class of contracts.²⁹ The questions, what form of execution is sufficient to bind the principal, and what form though insufficient to bind him will bind the agent, will be considered hereafter.³⁰ If a seal is affixed to a contract not required to be sealed, the seal may be disregarded; and in such case, if the contract is made in the name of the agent, parol evidence would be admissible, as in the case of ordinary contracts in writing, to charge the real principal or to enable him to sue.³¹ But the decisions are conflicting.³²

Negotiable Instrument.

Although bills of exchange, promissory notes, and other negotiable instruments are classed as simple contracts, they partake in many respects of the nature of specialties.³³ It is the rule of the law merchant that no one who is not

²⁸ Schack v. Anthony, 1 M. & S. 573; Berkeley v. Hardy, 8 D. & R. 102; Machesney v. Brown (C. C.) 29 Fed. 145; Guyon v. Lewis, 7 Wend. (N. Y.) 26; Stone v. Wood, 7 Cow. (N. Y.) 453; Klersted v. Orange, 69 N. Y. 343, 25 Am. Rep. 199; Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126; Fullam v. Inhabitants of West Brookfield, 9 Allen (Mass.) 1.

²⁹ Badger Silver Min. Co. v. Drake, 31 C. C. A. 378, 88 Fed. 48; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Tuthill v. Wilson, 90 N. Y. 423; Henricus v. Englert, 137 N. Y. 488, 33 N. E. 530; Farrar v. Lee, 10 App. Div. 130, 41 N. Y. Supp. 672; Borchertling v. Katz, 37 N. J. Eq. 150; Haley v. Belting Co., 140 Mass. 73, 2 N. E. 785; Sanger v. Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913 (the rule not changed by statute providing that no seal is necessary to validity of any instrument in writing, and that addition or omission of seal shall not affect the same).

³⁰ Post, p. 330.

³¹ Lancaster v. Ice Co., 153 Pa. 427, 26 Atl. 251; Stowell v. Eldred, 89 Wis. 614. See, also, Blanchard v. Inhabitants of Blackstone, 102 Mass. 343; Cook v. Gray, 133 Mass. 106.

³² An undisclosed principal cannot sue on a sealed contract, executed by the agent as such, though the seal is not essential to its validity. Smith v. Pierce, 45 App. Div. 628, 60 N. Y. Supp. 1011.

³³ 2 Ames, Cas. B. & N. 872.

named in or described as a party to the instrument can maintain an action⁸⁴ or be charged upon it.⁸⁵ Parol evidence to show who is the real principal is inadmissible. If, therefore, a bill or a note is made by an agent, the principal must appear thereon to be a party, or he will not be bound. The doctrine of undisclosed principal does not extend to such instruments. If the signature be "C. D.," although he was in fact the agent of "A. B.," evidence is not admissible to show that he intended to bind A. B. And even if, under the same circumstances, the signature was written "C. D., Agent," the name of the principal being undisclosed, the word "Agent" is to be regarded as *descriptio personæ*, and C. D. only is bound.⁸⁶ There are, indeed, many conflicting decisions regarding the construction of such instruments, and the questions what form is sufficient to bind the principal, and what to bind the agent, and under what circumstances, if at all, parol evidence is admissible to solve an ambiguity, will be considered later.⁸⁷

⁸⁴ Post, p. 308.

⁸⁵ *Liffkin v. Walker*, 2 Camp. 308; *In re Ansonia Co.*, L. R. 9 Ch. 635; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Arnold v. Sprague*, 34 Vt. 409; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903.

But if the name of the principal is not disclosed, and the seller does not rely exclusively upon the credit of the agent, he may, upon the dishonor of the paper, charge the principal for goods sold and delivered. *Pentz v. Stanton*, *supra*. See, also, *Harper v. Bank*, 54 Ohio St. 425, 44 N. E. 97.

⁸⁶ *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Anderton v. Shoup*, 17 Ohio St. 125; *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39; *Stinson v. Lee*, 68 Miss. 113, 8 South. 272, 9 L. R. A. 830, 24 Am. St. Rep. 257; *Cortland Wagon Co. v. Lynch*, 82 Hun, 173, 31 N. Y. Supp. 325.

⁸⁷ Post, p. 332.

Foreign Principal.

In England, no foreign principal may sue or be sued on a contract made by his agent in that country, unless it is proved that the agent was authorized to make the principal a contracting party, and it appears, either from the terms of the contract or from the surrounding circumstances, that the principal, and not the agent, was intended to be the contracting party.^{**} For this reason it seems that an undisclosed foreign principal cannot sue or be sued. In the United States there is no presumption that the agent of a foreign principal is exclusively liable,^{**} and apparently an undisclosed foreign principal can sue or be charged upon the contract.

^{**} Bowstead, Dig. Ag. art. 87; post, p. 365.

^{**} Post, p. 366.

CHAPTER X.

ADMISSIONS BY AGENT—NOTICE TO AGENT.

- 57. Admissions by Agent—When Competent.
- 58. Incompetent to Prove Authority.
- 59. Notice to Agent—Imputed Notice—Notice in Course of Employment.
- 60. Knowledge Acquired in Other Transaction.
- 61. General Exception—Adverse Interest of Agent.

ADMISSIONS BY AGENT—WHEN COMPETENT.

- 57. The statement of an agent is evidence against his principal, as an admission—
 - (a) When it was made with his authority; or
 - (b) When it was made by the agent in the transaction for his principal of some authorized business, to which it had reference and with which it was connected, so as to be a part of that transaction.

SAME—INCOMPETENT TO PROVE AUTHORITY.

- 58. The statement of an agent is not evidence against his principal, as an admission, to prove the existence of the agency or the extent of the authority.

In General.

An admission is a statement, or an act which amounts to a statement, of a fact material to the issue and adverse to the interest of the party who made it.¹ The admission of a party to an action is always admissible against him, and consequently the admission of his agent, if made under such circumstances that he must be deemed to be speaking through the lips of his agent, is also admissible against him. Admissions by agents must be distinguished from statements by agents which are themselves the very facts to be proved. "What the agent has said may be what constitutes the agree-

§§ 57-58. ¹ McKelvey, Ev. 90.

ment of the principal: or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation."³ An admission, however, is merely a substitute for other proof, or an additional means of proving the fact of which it is a statement, and which may be otherwise proved.

Admission by Agent—When Admissible against Principal.

In order that the statement of an agent may be evidence against the principal as an admission, the relation of principal and agent must first be proved. It is not enough, however, to show that the relation existed when the statement was made. It must appear that the agent was acting as such in making the statement. Of course, if it could be shown that the speaker had authority to make that particular statement, the proof would be sufficient. And, if A. refers B. to C. for information upon a particular matter, C.'s statements respecting such matter are evidence against A.,³ the agency being for the purpose of making statements. In other cases it must appear that the statement was made while the agent was engaged in transacting some authorized business for his principal, and had reference to, and was connected with, that business, so as to be a part of the pending transaction.⁴

³ Fairlie v. Hastings, 10 Ves. Jr. 123.

⁴ Williams v. Innes, 1 Camp. 364; Hood v. Reeve, 3 C. & P. 532; Burt v. Palmer, 5 Esp. 145; Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773; Chadsey v. Greene, 24 Conn. 562, 572; Over v. Schliffing, 102 Ind. 191, 26 N. E. 91.

It must appear that the reference was for that purpose. Proctor v. Railroad Co., 154 Mass. 251, 28 N. E. 13. See McKelvey, Ev. 103.

⁴ Fairlie v. Hastings, 10 Ves. Jr. 123; Garth v. Howard, 8 Bing. 451; United States v. Gooding, 12 Wheat. (U. S.) 460, 6 L. Ed. 693; Northwestern Union Packet Co. v. Clough, 20 Wall. (U. S.) 528, 22 L. Ed. 406; Fogg v. Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662; White v. Miller, 71 N. Y. 134, 27 Am. Rep. 13; McPherrin v. Jennings, 66 Iowa, 622, 24 N. W. 242.

It is commonly said that the statement must be made while the agent is engaged in transacting some authorized business, and must be so connected with it as to constitute part of the *res gestæ*.⁵ But "the Latin phrase adds nothing;" it is used here as an equivalent expression for the business on hand, or the pending transaction, as regards which for certain purposes the law identifies the principal and the agent.⁶ The use of "*res gestæ*" in this connection tends to confusion, by reason of its use in connection with declarations which are admissible as a part of the *res gestæ*; meaning thereby the surrounding circumstances or circumstantial facts, where no question of agency is necessarily involved.⁷

Provided the requirement that the statement be made as part of a pending transaction, as explained, be fulfilled, the nature of the transaction is immaterial, and the admission may be of a present or of a past fact. While the statement of an agent in negotiating a contract may constitute the agreement of the principal, or an inducement to the contract, and thus form the basis of an action upon the contract or for deceit, a statement made by the agent in the negotiation in regard to the subject-matter may also be used against the principal as an admission in an action not based upon the contract or the statement.⁸ Thus, in an action upon a statute to recover a penalty for selling coals short measure, it was held that what the defendant's agent, who made the sale, said bearing upon that issue, in respect to the sale about to take place and in respect to the coals which were the subject of the sale, was evidence against the defendant.⁹ And upon an indictment against the owner of a ves-

⁵ *United States v. Gooding*, 12 Wheat. (U. S.) 460, 6 L. Ed. 693; *Northwestern Union Packet Co. v. Clough*, 20 Wall. (U. S.) 528, 22 L. Ed. 406; *White v. Miller*, 71 N. Y. 134, 27 Am. Rep. 13.

⁶ See 15 Am. Law Rev. 80.

⁷ *Thayer*, Cas. on Ev. 630; *McKelvey*, Ev. 280; post, p. 252.

⁸ *Peto v. Hague*, 5 Esp. 134; *United States v. Gooding*, 12 Wheat. (U. S.) 460, 6 L. Ed. 693.

⁹ *Peto v. Hague*, 5 Esp. 134.

sel for being engaged in the slave trade, the appointment of the master and his general authority as such having been established, and evidence to show the nature of the voyage and the defendant's complicity having been introduced, it was held that declarations of the master, made when attempting to hire the witness as mate for the voyage then in progress, describing the same to be a voyage to the coast of Africa for slaves, were admissible as confirmatory of the proof against the defendant.¹⁰

The question of the agent's power to bind his principal by an admission is usually raised when the statement concerns a past fact. An agent, as such, has not power to make admissions, even in respect to a transaction in which he was himself concerned;¹¹ yet if, in the course of his employment, it becomes his duty or he has authority to deal with a person who asserts,¹² or against whom his principal asserts,¹³ rights based upon a past transaction, or to answer

¹⁰ *United States v. Gooding*, 12 Wheat. (U. S.) 460, 6 L. Ed. 693: "The evidence here offered," said Story, J., "was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise. He had an implied authority to hire a crew. * * * The testimony went to establish that he endeavored to engage Captain Colt to go as mate for the voyage then in progress, and his declarations were all made with reference to that object. * * * They were, therefore, in the strictest sense, a part of the *res gestæ*—the necessary explanations attending the attempt to hire."

¹¹ *White v. Miller*, 71 N. Y. 134, 27 Am. Rep. 13; *Phelps v. James*, 86 Iowa, 398, 53 N. W. 274, 41 Am. St. Rep. 497; *Idaho Forwarding Co. v. Insurance Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586. See *Luby v. Railroad Co.*, 17 N. Y. 131, and other cases cited note 32, *infra*.

¹² See cases cited notes 16-18, *infra*.

¹³ Where an attorney is retained, not only to sue a railroad company for damages caused by an accident, but also to present the plaintiff's claim and obtain settlement without suit, if possible, a letter written by his clerk, under his directions, to the company,

questions¹⁴ or to make statements to any person about it," what he then says while acting within the scope of his authority concerning it is evidence against his principal. On this ground the acknowledgment of an indebtedness upon demand for payment made by an agent who is the proper person from whom to demand payment is evidence against the principal as an admission of the debt,¹⁵ and may be used against him to take the case out of the statute of limitations.¹⁷ So, in an action against a railway company for the loss of a trunk, the declaration of the company's station master, made the next morning after the loss in accounting for the trunk to the plaintiff, was admissible; it being part of his duty to deliver the baggage of passengers and to account for the same, provided inquiries were made within a reasonable time.¹⁸ And similarly where a parcel was lost in transit, and the station master, in the ordinary course of his duty, made a statement to the police as to the absconding of a porter suspected to have taken it, with a view to his apprehension, the statement was held admissible against the

stating what purported to be the facts in the case, in response to an inquiry by the company, is admissible in evidence for the company. *Loomis v. Railroad Co.*, 159 Mass. 39, 34 N. E. 82. The admission of an attorney is not receivable unless made with reference to a matter in which he had authority to represent his client. *Fletcher v. Railway Co.*, 109 Mich. 363, 67 N. W. 330; *Pickert v. Hair*, 146 Mass. 1, 15 N. E. 79; *Treadway v. Railroad Co.*, 40 Iowa, 526.

As to the power of an attorney to make admissions in the conduct of a suit, *Marsh v. Mitchell*, 26 N. J. Eq. 497, 501; *Haas v. Society*, 80 Ill. 248; *Perry v. Manufacturing Co.*, 40 Conn. 313, 317; *McKelvey*, Ev. 103. See ante, p. 227.

¹⁴ *Morse v. Railroad Co.*, 6 Gray (Mass.) 450.

¹⁵ *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R. 9 Q. B. 468.

¹⁶ *Clifford v. Burton*, 1 Bing. 199 (offer of compromise upon application for payment).

¹⁷ *Anderson v. Sanderson*, 2 Stark. 204; *Id.*, Holt, N. P. 591; *Burt v. Palmer*, 5 Esp. 145; *Palethorp v. Furnish*, 2 Esp. 511, note.

¹⁸ *Morse v. Railroad Co.*, 6 Gray (Mass.) 450. See, also, *Lane v. Railroad Co.*, 112 Mass. 455; *Burnside v. Railway Co.*, 47 N. H. 554, 93 Am. Dec. 474.

company on the issue whether the parcel was stolen by one of its servants.¹⁹ On the other hand, in an action against a railway company for nondelivery of cattle within a reasonable time, the statement of a night inspector at a station, through which the trucks which carried the cattle would pass, made a week after the alleged occurrence, in answer to a question why he had not sent on the cattle, that he had forgotten them, was held inadmissible, on the ground that he had not authority to make admissions relative to bygone transactions.²⁰ This case is distinguishable from the preceding upon the ground that it was not part of the duty of the night inspector to render an account of the affair to the plaintiff in answer to his inquiries. So, where the plaintiff was injured by a fall from the gangway while attempting to go on board the defendant's steamboat, and afterwards during the voyage the captain admitted to her that it was through the carelessness of the hands in putting out the plank that she fell, it was held error to permit the admission to be received.²¹

Same—Declarations, When Part of Res Gestæ.

Every act or event is set about by surrounding circumstances, or circumstantial facts, which "may consist of declarations made at the time by participants in the act, or other acts done, of the position, condition, and appearance of inanimate objects, and of other elements which serve to illustrate the main act or event."²² Subject to not very well defined limitations, such circumstances may be proved as part of the thing done—the *res gesta*, or, as it is commonly put, the *res gestæ*. Such declarations comprise statements, exclamations, and other utterances by the participants in the act. They are received on the ground of their spontaneity. "They are the extempore utterances of the

¹⁹ *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R. 9 Q. B. 468.

²⁰ *Great Western Ry. v. Willis*, 18 C. B. (N. S.) 748.

²¹ *Northwestern Union Packet Co. v. Clough*, 20 Wall. (U. S.) 529, 22 L. Ed. 406.

²² *McKelvey*, Ev. 277.

mind under circumstances and at times when there has been no sufficient opportunity to plan false or misleading statements; they exhibit the mind's impressions of immediate events, and are not narrative of past happenings."²² Such declarations constitute an exception to the hearsay rule. To be admissible, they must be made while the act is being done or the event happening, or so soon thereafter that the mind of the declarant is actively influenced by it. The cases are not in accord as to the extent of the time which the *res gestæ* cover; and, indeed, the time necessarily depends more or less upon the circumstances of each case. The question always is whether the declaration is a spontaneous utterance or the mere narrative of a past act. When such declarations are admitted, they are generally made within a few minutes of the act or event to which they relate.²⁴

The application of this rule, or rather exception to the hearsay rule, frequently arises in accident cases, where the declaration of the person whose act caused the injury is sought to be introduced as tending to show his negligence or otherwise throwing light upon the nature of the act. Where one of the participants in the act is a servant or agent, there appears no reason for applying a different rule to his declaration, if part of the *res gestæ*, than to the declaration of any other person. If an act which causes injury to a third person, the plaintiff, is committed by a servant of the defendant, in the course of his employment, so as to be in law the act of the defendant, the act, with all its surrounding circumstances, or *res gestæ*, may be proved, and the declaration of any servant who participated in the act, if part of the *res gestæ*, is admissible against the defendant.²⁵ The admissi-

²² McKelvey, Ev. 278.

²⁴ *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 L. Ed. 437; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *Lund v. Inhabitants of Tyngsborough*, 9 Cush. (Mass.) 36, 42; *Earle v. Earle*, 11 Allen (Mass.) 1; *Waldele v. Railroad Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *Rockwell v. Taylor*, 41 Conn. 55, 59.

²⁵ *Hanover R. Co. v. Coyle*, 55 Pa. 396; *Ohio & M. Ry. Co. v.*

bility of the declaration, although made by a servant, does not depend upon his power to bind his master by his admissions, but upon its being part of the *res gestæ*. If a declaration is admissible as part of the *res gestæ*, it is competent, no matter by whom made.²⁶ Upon the same ground a declaration of the party injured may be admissible in his own favor.²⁷

Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733; Cleveland v. Newsom, 45 Mich. 62, 7 N. W. 222; Keyser v. Railway Co., 66 Mich. 390, 33 N. W. 867; O'Connor v. Railway Co., 27 Minn. 106, 6 N. W. 481, 38 Am. Rep. 288; Hermes v. Railway Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69; Hooker v. Railway Co., 76 Wis. 542, 44 N. W. 1085; Marion v. Railway Co., 64 Iowa, 568, 21 N. W. 86; Omaha & R. V. Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290; Lightcap v. Traction Co. (C. C.) 60 Fed. 212.

The declaration must, of course, characterize the act. Ohio & M. Ry. Co. v. Stein, *supra*; Butler v. Railway Co., 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. Rep. 738.

²⁶ In an action by an administrator against a railway company to recover damages for decedent's death, declarations of decedent, which were made immediately after he was injured and while he was being extricated from under the wheels of the car, were admissible, against defendant, as part of the *res gestæ*. Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883.

Where a brakeman on a flat car received an injury in a collision between such car and a detached portion of the train while making a running switch, and two minutes after, while he was still on the car, the engineer walked a car length from the engine to where the brakeman was, declarations by the engineer as to the cause of the accident, which did not refer to acts done or matters happening before the collision, were admissible against the company as part of the *res gestæ*. "Counsel argue," said Elliott, C. J., " * * * that the declarations admitted in that case [Louisville, N. A. & C. Ry. Co. v. Buck, *supra*] were those of the injured person, while the declarations admitted in this instance were those of the agent or servant. A complete and effective answer to this argument is that, if the declarations were * * * part of the *res gestæ*, they were competent, no matter by whom they were made." Ohio & M. Ry. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733.

²⁷ Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566, 19 N. E.

It must be conceded that the admissibility of declarations of servants and agents whose admissibility rests upon the ground that they are part of the *res gestæ*, in its proper sense, is often treated as depending upon the power of an agent to bind his principal by his admissions. "Where the acts of the agent will bind the principal," it is said, "there his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting a part of the *res gestæ*."²⁸ It is believed, however, that a distinction should be drawn.²⁹ On the one hand, declarations made at the time of the act by the parties participating therein, and part of the *res gestæ*—that is, of the surrounding circumstances—are admissible, irrespective of whether the participants are servants of the person sought to be held responsible for the act, and by whomsoever made. On the other hand, the statement of a servant or agent is admissible as an admission, if it is made when he is engaged in some authorized transaction, and it is within the scope of his authority in that transaction to make the statement. To illustrate: In an action against a railway company, by a person injured by a collision, the declaration of the engineer, referring directly to and characterizing or explaining the occurrence, made at the time or immediately afterwards, under its immediate influence, may, under the circumstances of the case, be held part of the *res gestæ*, and admissible against the company upon that ground.³⁰ It might be, however, that some subsequent statement of the engineer, as to the cause of the accident, although not part of the *res gestæ*, would be evidence against the company as an admission; as, for example, if it happened to be

453, 2 L. R. A. 520, 9 Am. St. Rep. 883. Cf. *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 L. Ed. 437.

²⁸ Story, Ag. § 134, frequently quoted in this connection. See cases cited, note 25, *supra*.

²⁹ See Thayer, Cas. on Ev. 630; McKelvey, Ev. 280.

³⁰ *Ohio & M. Ry. Co. v. Stein*, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733.

made by him in the course of his duty in making a report of the accident to a superior officer.⁸¹ In the one case the declaration of the engineer is admissible as a circumstantial fact, as part of the *res gestæ*, because it is the spontaneous utterance of a participant in the event. In the other case his statement is admissible against the company as an admission, because it is made at a time and under circumstances when the engineer has authority to make it. If the statement is not admissible either as a declaration forming part of the *res gestæ*, or as an admission, it cannot be received.⁸²

Admission Incompetent to Prove Agency.

It follows from what has been said that neither the existence of the agency nor its extent can be proved by the admission of the agent.⁸³ His power to make admissions rests upon the very fact that he is agent, and has authority to

⁸¹ *Texas & P. Ry. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955. See, also, *Keyser v. Railway Co.*, 66 Mich. 390, 33 N. W. 867; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; *Meyer v. Insurance Co.*, 104 Cal. 381, 33 Pac. 82. Cf. *North Hudson Co. R. Co. v. May*, 48 N. J. Law, 401, 5 Atl. 276.

It has been held that letters of an agent to his principal, in which he renders an account of his transactions, are not admissible, as being mere narration. *Langhorn v. Allnutt*, 4 Taunt. 511; and see *Re Davila*, 22 Ch. D. 593; *United States v. The Burdett*, 9 Pet. (U. S.) 682, 689, 9 L. Ed. 273. Contra, *The Soloway*, 10 Prob. D. 137, 54 L. J. P. 83.

⁸² See *Luby v. Railroad Co.*, 17 N. Y. 131; *Lane v. Bryant*, 9 Gray (Mass.) 245, 69 Am. Dec. 282; *Williamson v. Railroad Co.*, 144 Mass. 148, 10 N. E. 790; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *Durkee v. Railroad Co.*, 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562.

⁸³ *Brigham v. Peters*, 1 Gray (Mass.) 189; *Mussey v. Beecher*, 3 Cush. (Mass.) 511; *Hatch v. Squires*, 11 Mich. 185; *Sencerbox v. McGrade*, 6 Minn. 484 (Gil. 334); *Sax v. Davis*, 71 Iowa, 406, 32 N. W. 403; *Howe Mach. Co. v. Clark*, 15 Kan. 492; *Bohanan v. Railroad*, 70 N. H. 526, 49 Atl. 103.

Admissions of an agent are not evidence without proof of agency, but the former may be admitted before proof of the latter. *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. Ed. 283.

make the statement which constitutes the admission. To receive his statement as an admission of that authority would be to proceed in a circle. He is, however, competent as witness to testify to the fact and terms of his appointment, if it was not conferred by writing.³⁴ Neither is it competent to prove the extent of his authority by his acts when the effect of such proof would be only to show his assertion of the powers assumed.³⁵ Such proof is inadmissible except to show a course of dealing acquiesced in by the principal, from which authority to do other similar acts might be implied, or as the foundation for an estoppel.³⁶

**NOTICE TO AGENT—IMPUTED NOTICE—NOTICE IN
COURSE OF EMPLOYMENT.**

59. When, in the course of his employment, the agent acquires knowledge, or receives notice, of any fact material to the business in which he is employed, the principal is deemed (subject to the exception stated in section 61) to have notice of such fact.

SAME—KNOWLEDGE ACQUIRED IN OTHER TRANSACTION.

60. Different rules prevail in different jurisdictions as to whether the doctrine of imputed notice extends to knowledge acquired by the agent while acting in a different transaction:

- (a) In some jurisdictions, the rule of imputed notice is strictly confined to facts of which the agent acquires knowledge, or receives notice, in the particular transaction in which he is then employed.**

³⁴ Gould v. Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; Thayer v. Meeker, 86 Ill. 470; Howe Mach. Co. v. Clark, 15 Kan. 492; Roberts v. Insurance Co., 90 Wis. 210, 62 N. W. 1049 (though agent is husband of principal).

³⁵ Graves v. Horton, 38 Minn. 68, 35 N. W. 568; Leu v. Mayer, 52 Kan. 419, 34 Pac. 969.

³⁶ Ante, pp. 36, 37, 174.

- (b) In most jurisdictions, the rule prevails that knowledge of a fact material to the business in which the agent is employed, if actually present in his mind during the agency and while acting on the principal's behalf, although acquired by him in another transaction and while acting for another principal, is deemed (subject to the exception stated in section 61) notice to the principal, provided that it would not be a breach of the agent's duty to his former principal to disclose the fact.

SAME—GENERAL EXCEPTION—ADVERSE INTEREST OF AGENT.

61. The knowledge of the agent will not be imputed to the principal, when the agent is engaged in committing an independent fraudulent act upon his own account, and the knowledge sought to be imputed is of facts which relate to that act, and which it would be against his interest to disclose.

In General.

In business dealings the rights and obligations of one person may be affected by the knowledge or notice which he may have of the adverse rights or equities of persons other than the one with whom he deals, or of other facts which, because known to him, give a different character to his act. And, if he deals through an agent, his rights and obligations are, as a rule, equally affected by knowledge or notice of any such matter which comes to the agent in the course of the business in which he is employed. Notice to the agent is notice to the principal, if it is acquired in the very transaction in which he is then employed.¹ It is commonly said

§§ 59-61. ¹ *Le Neve v. Le Neve*, 1 Ves. Sr. 64; *Sheldon v. Cox*, Amb. 624; *Hiern v. Mill*, 13 Ves. 120; *The Distilled Spirits*, 11 Wall. (U. S.) 356, 20 L. Ed. 167; *Suit v. Woodhall*, 113 Mass. 391; *MaComb v. Wilkinson*, 83 Mich. 486, 47 N. W. 336.

Where the agent of an insurance company negotiated a contract of insurance with a man who had lost an eye, the company was affected with the agent's knowledge of the fact, and could not avoid

that the general rule that a principal is bound by the knowledge of his agent is based on the principle that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of the agency, and the presumption that he will do his duty;² but this reason, like many others assigned for the identification of principal and agent, is somewhat artificial.³ Within certain limits, it is reasonable and just to impute the knowledge of the agent to the principal, and to the extent of imputing notice of what the agent learns or receives notice of in the same transaction the courts are agreed.⁴ If the agent fails to complete the transaction, and it is taken up and completed by a second agent, notice of a material fact, which comes to the knowledge of the first agent while acting for the principal, will not be imputed to him.⁵

Notice Acquired in Different Transaction.

Whether the doctrine of imputed notice may be extended to knowledge acquired by the agent in a previous or dif-

the contract on account of its nondisclosure by the assured. *Bawden v. London, E. & G. Assur. Co.* [1892] 2 Q. B. 534.

See, generally, cases cited pp. 260, 261.

² *The Distilled Spirits*, 11 Wall. (U. S.) 358, 20 L. Ed. 167.

³ Post, p. 264, note 23.

⁴ Otherwise it would be possible to avoid the possibility of notice by employing an agent. *Sheldon v. Cox*, Ambl. 624.

⁵ *Irvine v. Grady*, 85 Tex. 120, 19 S. W. 1028; *Blackburn v. Vigors*, 12 App. Cas. 531. Cf. *Blackburn v. Haslam*, 21 Q. B. D. 144.

"By some it is held that the rule rests upon the principle of the legal identity of the principal and agent. By others it is placed upon the ground that when a principal has consummated a transaction in whole or in part, through an agent, it is contrary to equity and good conscience that he should be permitted to avail himself of the benefits of his agent's participation without becoming responsible as well for his agent's knowledge as for his agent's acts. * * * The latter, in our opinion, is the more reasonable and equitable foundation for the rule, and gives it a more salutary operation. Such being, in our opinion, the proper ground, * * * we think the knowledge of Moore should not be imputed to Irvine." Per Gaines, J., in *Irvine v. Grady*, *supra*.

ferent transaction is a question upon which there is a conflict of authority.

(a) By the earlier view, which formerly prevailed in England,⁶ and which still prevails in some jurisdictions in this country,⁷ it was held that the rule could not be extended so far as to affect the principal by knowledge acquired by the agent in another transaction and at another time. The agent "cannot stand in the place of the principal," it was said, "until the relation of principal and agent is constituted, and as to all information previously acquired the principal is a mere stranger."⁸ "Notice to him [the agent] twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be."⁹

(b) At an early day the extreme technicality of the then prevailing view was recognized, and Lord Eldon declared that he should be unwilling to say "that if an attorney has notice of a transaction in the morning he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances."¹⁰ In England the view seems now to be established that knowledge of an agent acquired previous to the agency, but actually present in his mind during the agency and while acting for his principal, and material to the business delegated, will, as respects such transaction or matter, be deemed notice to the principal.¹¹ This view has been approved by the Supreme Court of the United States,¹² and is the view more generally prevailing.¹³

⁶ *Warrick v. Warrick*, 3 Atk. 291; *Worsley v. Earl of Scarborough*, 3 Atk. 392. See *Fuller v. Bennett*, 2 Hare, 294.

⁷ *Houseman v. Association*, 81 Pa. 256; *Barbour v. Wiehle*, 116 Pa. 308, 9 Atl. 520; *McCormick v. Joseph*, 83 Ala. 401, 3 South. 796; *Texas Loan Agency v. Taylor*, 88 Tex. 47, 29 S. W. 1057.

⁸ *Mountford v. Scott*, 3 Mad. 34, per Leach, V. C.

⁹ *Houseman v. Association*, 81 Pa. 256.

¹⁰ Per Lord Eldon in *Mountford v. Scott*, 1 Turn. & R. 274.

¹¹ *Dresser v. Norwood*, 17 C. B. (N. S.) 466.

¹² *The Distilled Spirits Case*, 11 Wall. (U. S.) 356, 20 L. Ed. 167.

¹³ *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319; *Constant v. University*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734.

It must be established by the person asserting notice that the knowledge was present in the agent's mind,¹⁴ although the burden would doubtless be sustained in any case if the information had been acquired so recently as to make it incredible that he should have forgotten it.¹⁵

Where the agency is continuous, and is concerned with a business made up of a long series of transactions, as where the agent is the cashier of a bank, or otherwise placed in constant management and control of his principal's business, it seems that knowledge acquired or notice received by the agent during the course of the agency, although not acquired or received in the particular transaction which may be in question, will be imputed to the principal without proof that the agent retained it in his memory.¹⁶ It is important to remember that knowledge acquired by the agent in another transaction is not, like notice acquired in the same transaction, to be imputed to the principal as matter of law;

7 Am. St. Rep. 769; *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 398; *Lebanon Sav. Bank v. Hollenbeck*, 20 Minn. 322, 13 N. W. 145; *Wilson v. Association*, 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659; *Shafer v. Insurance Co.*, 53 Wis. 361, 10 N. W. 381; *Chouteau v. Allen*, 70 Mo. 290; *Pennoyer v. Willis*, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 594; *Westerman v. Evans*, 1 Kan. App. 1, 41 Pac. 675; *Chicago, St. P., M. & O. R. Co. v. Bellwith*, 28 C. C. A. 358, 83 Fed. 437; *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45.

¹⁴ *Constant v. University*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Yerger v. Barz*, 56 Iowa, 77, 8 N. W. 769; *Equitable Securities Co. v. Sheppard*, 78 Miss. 217, 28 South. 217; *Gregg v. Baldwin*, 9 N. D. 515, 84 N. W. 373.

¹⁵ *The Distilled Spirits Case*, 11 Wall. (U. S.) 356, 20 L. Ed. 167; *Chouteau v. Allen*, 70 Mo. 290; *Brothers v. Bank*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; *Foot v. Bank*, 17 Utah, 283, 54 Pac. 104.

¹⁶ It has been so held when the principal is a corporation. *Holden v. Bank*, 72 N. Y. 286; *Cragle v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; *Brothers v. Bank*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932.

that is, irrespective of whether the agent actually had it in mind while engaged in the pending transaction. It is upon this ground that it is held, even in jurisdictions which extend the rule of imputed notice to knowledge acquired in other transactions, that the principal is not legally chargeable with such knowledge.¹⁷ It must in each case depend upon the circumstances.

One exception to this rule is to be noted. Notice will not be imputed to the principal if the fact of which the agent has knowledge was acquired by the agent confidentially as agent for another principal, under such circumstances that it would be a betrayal of professional confidence and a breach of his duty to the other principal to disclose it.¹⁸

Notice must be of Matter within Scope of Agency.

The danger of extending the rule of imputed notice has always been recognized. It was this consideration that made the courts averse to extending it to knowledge acquired in another transaction; for, it was urged, the man of greatest practice and greatest eminence will then be most dangerous to employ.¹⁹ The rule, even if it be so extended, subject to the limitations mentioned, applies only to knowledge of facts which are material in the business for which the agent is employed. To affect the principal with notice, the matter known to the agent must be something within the scope of his agency; that is, in reference to which he has authority to act or which it is his duty in the capacity in which he is employed to communicate.²⁰ "As it is the rule that whether

¹⁷ *St. Paul Fire & Marine Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240; *Union Nat. Bank v. Insurance Co.*, 18 C. C. A. 203, 71 Fed. 473.

¹⁸ *The Distilled Spirits Case*, 11 Wall. (U. S.) 356, 20 L. Ed. 167; *Constant v. University*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769.

¹⁹ *Worsley v. Earl of Scarborough*, 3 Atk. 392.

²⁰ *Wylie v. Pollen*, 32 L. J. Ch. 782; *Tate v. Hyslop*, 15 Q. B. D. 868; *Trentor v. Pothan*, 46 Minn. 298, 49 N. W. 120, 24 Am. St. Rep. 225; *Strauch v. May*, 80 Minn. 343, 83 N. W. 156; *Hickman v. Green*,

the principal is bound by the contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions. Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact extent and scope of the agency."²¹

General Exception—Disclosure against Interest.

The principal is not bound by the knowledge of his agent when it would be against the agent's interest to inform him of the facts. Therefore, if the agent is engaged in perpetrating an independent fraud on his own account, knowledge of facts relating to the fraud will not be imputed to the principal.²² The principal is not bound, it is said, when the character and nature of the agent's knowledge make it intrinsic

123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; *Pennoyer v. Willis*, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 504; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 553, 42 L. Ed. 977; *Bohunan v. Railroad Co.*, 70 N. H. 526, 49 Atl. 103.

"Where the employment of the agent is such that in respect to the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is correct." Per Lord Halsbury in *Blackburn v. Vigors*, 12 App. Cas. 531, 537.

²¹ *Trentor v. Pothen*, 46 Minn. 208, 49 N. W. 129, 24 Am. St. Rep. 225.

In this case it was held that when an attorney was employed to examine an abstract of title, and to give an opinion as to the sufficiency of the title, it was not within the scope of the agency to go beyond the record evidences of title, and that consequently the client was not charged with notice of an adverse claim not disclosed by the record, which had come to the knowledge of the attorney while engaged in another transaction for another client.

²² *Cave v. Cave*, 15 Ch. D. 639; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Thompson-Houston Electric Co. v. Electric Co.*, 12 C. C. A. 643, 65 Fed. 341; *Dillaway v. Butler*, 135 Mass. 479; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *National Life Ins. Co. v. Minch*,

ally improbable that he will inform his principal. Whether the rule or the exception rest upon a presumption that the agent will or will not communicate the facts to his principal may be doubted.²³ Whatever the reasons for the exception, it is well established. Of course, if the agent is openly acting adversely to his principal, his knowledge will not be imputed to the latter.²⁴ In such case he is not acting as agent, but on his own behalf.

53 N. Y. 144; *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39; *Benton v. Manufacturing Co.*, 73 Minn. 498, 76 N. W. 265; *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75.

A person cannot be held as a conspirator because his agent has knowledge of, or has participated in, a conspiracy. *Benton v. Manufacturing Co.*, *supra*.

Actual malice is not to be imputed because of the knowledge of another person, however related. *Reisan v. Mott*, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489.

²³ "It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by the agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master." Per Field, J., in *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185. See, also, *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658.

²⁴ *Third Nat. Bank v. Harrison* (C. C.) 10 Fed. 243; *Corcoran v. Cattle Co.*, 151 Mass. 74, 23 N. E. 727; *First Nat. Bank v. Babbidge*, 160 Mass. 563, 36 N. E. 462; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736; *Wickersham v. Zinc Co.*, 18 Kan. 431, 26 Am. Rep. 784.

The fact that an agent also acts as agent for the party adversely interested in the transaction does not prevent his principal from being bound by notice to or knowledge acquired by such agent where the principal consents to such adverse agency.—*Pine Mountain Iron & Coal Co. v. Bailey*, 36 C. C. A. 229, 94 Fed. 258.

Notice to Subagent.

If an agent has authority to employ a subagent, it seems that the same principles must apply as to the notice to be imputed to the principal as in cases of agents appointed by him directly, and that notice to the subagent of any fact material to the business which he is authorized to transact is notice to the principal.²⁵ This rule is frequently applied in cases of subagents appointed by insurance agents.²⁶ Nor would it seem to be material, so long as the agent had authority to appoint the subagent, whether privity of contract existed between him and the principal.²⁷ If the principal is bound by his act, he should also be charged by his knowledge. It has been held, however, by the Supreme Court of the United States, that where a creditor placed an account in the hands of a collecting agency, with instructions to collect, and the agency sent the claim to an attorney at the place of residence of the debtor, who persuaded him to confess judgment, the attorney was the agent of the collecting agency, and not of the creditor, and that his knowledge of the insolvency of the debtor, who was soon after adjudged a bankrupt, was not chargeable to the creditor, so as to render the judgment a preference.²⁸ The decision was placed upon the

²⁵ *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

²⁶ *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721; *Carpenter v. Insurance Co.*, 135 N. Y. 298, 31 N. E. 1015; *Union Cent. Life Ins. Co. v. Smith*, 105 Mich. 353, 63 N. W. 438.

²⁷ *Ante*, p. 123.

²⁸ *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392: "Neither can it be doubted that, where an agent has power to employ a subagent, the acts of the subagent, or notice given to him in the transaction of the business, have the same effect as if done or received by the principal. * * * For the acts of a subagent the principal is liable, but * * * for the acts of the agent of an intermediate independent employer he is not liable. It is difficult to lay down a precise rule which will define the distinctions arising in such cases. The application of the rule is full of embarrassment. * * * Such attorney

ground that the attorney was the agent of an intermediate, independent contractor. Three members of the court dissented, holding that the attorney was the creditor's agent.²⁹

Notice to Officer of Corporation.

The foregoing rules apply equally to officers and other agents of corporations. Indeed, many of the cases which have been here cited in their support are cases in which notice was imputed to a corporation. When the officer in question is a director, it must be remembered that the directors of a corporation have power to bind it only when acting as a board.³⁰ It follows that notice to a director, or knowledge acquired or possessed by him individually, and not while acting in his official capacity, as a member of the board, is not to be imputed to the corporation.³¹ But if when so acting

is the agent of the collection agent, and not of the creditor who employed that agent." Opinion of the court, per Hunt, J.

²⁹ "The attorney * * * acted for them [the creditors], and was compelled to use their name. * * * I am at a loss to see how their liability is changed by the fact that the notes were sent to him through a commercial or collecting agency. This agency had no interest in the notes; was not liable to the attorney for his fees. * * * The notes were not indorsed to this agency, nor could it in any manner have prevented Wise & Co. from controlling all the proceedings of the attorney for collecting of the money. * * * The effect of this decision is that a nonresident creditor, by sending his claim to a lawyer through some indirect agency, may secure all the advantages of priority and preference which the attorney can obtain of the debtor, well knowing his insolvency, without any responsibility under the bankrupt law." Per Miller, J., dissenting, in *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392. See comments on this case in *Bates v. Mortgage Co.*, 37 S. C. 88, 16 S. E. 883, 21 L. R. A. 340.

³⁰ *Clark, Corp.* 488, 502.

³¹ *Bank of United States v. Davis*, 2 Hill (N. Y.) 431; *Buttrick v. Railroad Co.*, 62 H. H. 413, 13 Am. St. Rep. 578; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362; *Farrel Foundry v. Dart*, 26 Conn. 376; *New Haven, M. & W. R. Co. v. Town of Chatham*, 42 Conn. 465.

Otherwise if communicated to him as director for the purpose of

he has actual knowledge of some fact material to the business in hand, the corporation will be affected, subject to the exceptions which apply to other agents, with notice.³² Notice to a stockholder is not notice to the corporation.³³

being communicated to the board. *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *National Bank v. Norton*, 1 Hill (N. Y.) 572 (semble).

³² *National Security Bank v. Cushman*, 121 Mass. 490; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Bank of United States v. Davis*, 2 Hill (N. Y.) 451.

³³ *Housatonic Bank v. Martin*, 1 Metc. (Mass.) 294.

CHAPTER XI.

LIABILITY OF PRINCIPAL TO THIRD PERSON—TORTS AND CRIMES.

- 62. Liability for Torts—Act Commanded or Ratified.
- 63. Liability of Master for Tort of Servant.
- 64. Liability of Principal for Tort of Agent—In General.
- 65. Fraud.
- 66. Fraud not for Principal's Benefit—Estoppel.
- 67. Liability for Crimes.

TORTS—ACT COMMANDED OR RATIFIED.

- 62. A person is liable for a tort committed by another pursuant to his command, or which he has duly ratified.**

In General.

Whoever commits a wrong is liable for it; and it is immaterial whether the act be done by him in person or by another acting under his command.¹ Qui facit per alium facit per se. And if a wrong results as a natural consequence of an act commanded, the person who commanded the act is answerable not less than if he had commanded the wrong.² Moreover, a person may become liable by ratification for a wrongful act committed without authority on his behalf.³ The liability of one person for wrongs committed by another, however, is not confined to cases where logically the wrong can be deemed a result of his command or authority. A person may be liable as principal for wrongs which he has not authorized because he stands to the actual wrongdoer

§ 62. ¹ State v. Smith, 78 Me. 260, 4 Atl. 412, 57 Am. Rep. 802 (and cases cited); Herring v. Hoppock, 15 N. Y. 409; Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Maler v. Randolph, 33 Kan. 340, 6 Pac. 625.

² Gregory v. Piper, 9 B. & C. 591; Jaggard, Torts, 245-247.

³ Dempsey v. Chambers, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249; ante, p. 47.

in a relation which makes him so answerable. Such a liability seldom arises unless the relation is that of master and servant, but it arises also, though less frequently, when the relation is that of principal and agent in the narrow sense.

LIABILITY OF MASTER FOR SERVANT'S TORT.

63. The master is liable for the tort of his servant committed when acting within the course of the employment and in furtherance of it.

Liability of Master for Tort of Servant.

The master is liable for the tort of his servant committed by him when acting within the course of the employment, and in furtherance of it, or, as it is often put, for his master's benefit, although he did not authorize, and even if he expressly forbade, the wrongful act.¹

As we have seen,² the relation of master and servant exists only between persons one of whom employs the other to perform services subject to the employer's direction and control. "A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the end also, or, as it has been put, retains the power of controlling the work; and he who does work on those terms is in law a servant for whose acts, neglects, and defaults, to the extent to be specified, the master is liable."³ On the other hand, if the person employed is one who undertakes to produce a given result, and the employer does not retain the right to order and control the manner

§ 63. ¹ *Limpus v. General Omnibus Co.*, 1 H. & C. 526; *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259; and cases cited post, pp. 270-274. See *Pollock (Webb's) Torts*, 88-111, followed generally in this section; *Jaggard, Torts*, 239-280.

² *Ante*, p. 6.

³ *Pollock (Webb's) Torts*, 92. See *Sadler v. Henlock*, 4 E. & B. 570; *Quarman v. Burnett*, 6 M. & W. 499; *Murphy v. Caralli*, 3 H. & C. 462; *Murray v. Currie*, L. R. 6 C. P. 24; *Lawrence v. Shipman*, 39 Conn. 586; *Finger Mfg. Co. v. Rahm*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; *Wood v. Cobb*, 13 Allen (Mass.) 58.

in which the work shall be done, the person is not a servant, but an independent contractor, for whose acts, neglects, and defaults in the course of the employment the employer is not ordinarily responsible.⁴ The employer, nevertheless, remains answerable for what he has caused to be done, and if the result to be accomplished by the independent contractor is an unlawful act, as a trespass or a nuisance, or is likely to be attended with injurious consequences, he is not less liable than if he had acted in person; nor can the employer escape liability if in the performance of the work the contractor fails to conform to a standard of duty which is required of the employer absolutely, by law or contract; and, if the employer fails to use due care in the selection of a competent contractor, he is, perhaps, answerable for the latter's negligence.⁵

The distinction, already drawn, between a servant and an agent should be borne in mind. For the purposes of this discussion, a servant may be defined as a person employed to render to his employer, subject to his direction and control, services which are not of a nature to create new legal relations between the employer and third persons.⁶

Same—Course of Employment.

A servant is acting in the course of his employment when he is engaged in that which he was employed to do and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct.⁷ Thus a servant employed to drive a delivery wag-

⁴ See cases cited in preceding note.

⁵ Jaggard, Torts, 231-238.

⁶ Ante, p. 5.

⁷ Mitchell v. Crasweller, 13 C. B. 237; Joel v. Morison, 6 C. & P. 501; Story v. Ashton, L. R. 4 Q. B. 476; Ayer v. Railroad Co., 30 N. J. Law, 460; Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635.

on does not necessarily cease to be acting in the course of his employment because to suit his own convenience he takes a roundabout way; but if he starts upon an entirely new journey, whether at the beginning or end or middle of his proper duty, on his own account, he is no longer in the course of his employment. The question is one of fact.⁸ "In determining whether a particular act is done in the course of the servant's employment, it is proper to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended."⁹ The act is done in furtherance of the employment, or for the master's benefit, if it is done with a view to the furtherance of his business.¹⁰

Same—Furtherance of Employment.

The wrongful act for which the master is answerable may be due (1) to the servant's negligence, or (2) it may consist in excessive or mistaken execution of his authority, or (3) it may be a willful wrong.

(1) Where the wrong results from the servant's want of care in doing an act in the course of his employment, the act

⁸ *Burns v. Poulson*, L. R. 8 C. P. 563; *Stevens v. Woodward*, 6 Q. B. 318; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824; *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361.

⁹ *Per Mitchell, J.*, in *Morier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

¹⁰ *Limpus v. General Omnibus Co.*, 1 H. & C. 526; *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173, 44 Am. St. Rep. 359, and cases there cited; *Illinois Cent. R. Co. v. Latham*, 72 Miss. 32, 16 South. 757.

itself, being one which if properly performed would be in furtherance of the master's business, the requirement that the act must be in furtherance of the employment is fulfilled.¹¹ And, even if the negligence consists in mere omission to do an act which it is the duty of the servant in the course of his employment to do, the master is answerable.¹²

(2) Where the wrongful act consists in excessive or mistaken execution of the servant's authority, the master is liable, provided the act, if done properly or under the circumstances erroneously supposed by the servant to exist, would have been lawful, and provided, also, the servant intended to do on behalf of his master an act which he was in fact authorized to do.¹³ For example, where a train servant who has authority to remove disorderly passengers, under misapprehension that a passenger is disorderly, removes him, and in so doing uses excessive force, the master is answerable. By giving the servant authority to remove disorderly passengers, the master necessarily gives him authority to determine whether the passenger is disorderly, and the servant is hence acting in the course of employment; and since the servant intends to do an act which he is authorized to do, notwithstanding that he uses excessive violence, he is acting in furtherance of the master's business.¹⁴ So, where a servant, having authority for the protection of his master's interests to arrest persons attempting a theft, unlawfully arrests a supposed offender on his master's behalf, the

¹¹ *Burns v. Poulson*, L. R. 8 C. P. 563; *Sleath v. Wilson*, 9 C. P. 607; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. Ed. 502; *Weed v. Railroad Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400; *Phelon v. Stiles*, 43 Conn. 426.

¹² *Chapman v. Railroad Co.*, 33 N. Y. 369, 88 Am. Dec. 392.

¹³ *Pollock (Webb's) Torts*, 101; *Bayley v. Manchester, S. & L. Ry.*, L. R. 8 C. P. 148.

¹⁴ *Seymour v. Greenwood*, 6 H. & N. 359, 7 H. & N. 355; *Higgins v. Railroad Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Rounds v. Railroad Co.*, 64 N. Y. 129, 21 Am. Rep. 597.

master is liable although in the performance of his supposed duty the servant mistakes the occasion for it, or exceeds his powers, or employs excessive force.¹⁵

(3) Where the wrong committed by the servant is willful and deliberate, the master is nevertheless liable, provided the act is committed in the course of the employment and for the master's purposes, and not merely for the servant's private ends; and this, as in other cases, although the servant's conduct is of a kind actually forbidden.¹⁶ Thus, where an omnibus driver obstructed a rival omnibus by pulling across the road in front of it, and caused it to upset, it was held proper to instruct the jury that if he acted in the way of his employment, and in the supposed interest of his employer, as against a rival in the business, although needlessly, wantonly, and improperly, the master was answerable for his conduct, and this notwithstanding that he had been instructed not to race with or obstruct rival omnibuses, but that if the true character of his act was that it was an act of his own, and in order to effect a purpose of his own, the master was not responsible.¹⁷ "A master is responsible for the torts of his servant done with a view to the furtherance of the master's business, whether the same be done negligently or willfully, but within the scope of his agency. The fact that the servant, in committing the tort, may have exceeded his actual

¹⁵ *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824; *Palmeri v. Railway Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19. Cf. *Gobb v. Great Northern Ry.*, 3 E. & E. 672; *Poulton v. London & S. W. Ry. Co.*, L. R. 2 Q. B. 534; *Central Ry. Co. v. Brewer*, 78 Md. 304, 28 Atl. 615, 27 L. R. A. 63; *Mulligan v. Railway Co.*, 129 N. Y. 505, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 559.

¹⁶ *Limpus v. General Omnibus Co.*, 1 H. & C. 528; *Seymour v. Greenwood*, 6 H. & N. 359; *Howe v. Newmarch*, 12 Allen (Mass.) 49; *Wallace v. Express Co.*, 134 Mass. 95, 45 Am. Rep. 301; *Rounds v. Railroad Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Texas & P. R. Co. v. Scoville*, 10 C. C. A. 479, 62 Fed. 730, 27 L. R. A. 179.

¹⁷ *Limpus v. General Omnibus Co.*, 1 H. & C. 528.

authority, or even disobeyed his express instructions, does not alter the rule."¹⁸

Only the general rule has been stated. A fuller statement of the master's liability would show that it is even broader under some circumstances, as where he owes a peculiar duty to the person injured,¹⁹ or intrusts his servant with dangerous instrumentalities.²⁰ This rule is subject to an important exception, where the person injured is a fellow servant of the tortfeasor.²¹ It is beyond the scope of this book to follow the rule into its manifold applications in the field of master and servant.

Same—Ground of Liability.

It is manifest that this rule differs essentially from that governing the liability of the principal for his agent's contract. In that case the third person is dealing with the agent, and is bound at his peril to ascertain the extent of his authority, and if he fails to do so takes the risk of the contract not falling within the agent's powers, real or apparent.²² The power of the servant to subject his master to liability for tort is not affected by any knowledge which the third person may have of the extent of the servant's authority. He is not dealing with the servant. It is enough to give him a right of action that he is injured by the servant's act, and that the act was committed while the latter was engaged in what he was employed to do and in furtherance of the employment. The reason for the master's vicarious liability is not clear.²³ The commonly accepted explanation is that given by Chief Justice Shaw: "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or his agents or servants, shall so conduct them as not to

¹⁸ Per Mitchell, J., in *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19.

¹⁹ Jaggard, Torts, 261 et seq.

²⁰ Jaggard, Torts, 264 et seq.

²¹ Jaggard, Torts, 1029 et seq.

²² Ante, p. 180 et seq.

²³ Ante, p. 11.

injure another; and if he does not, and another thereby sustains damage, he shall answer for it."²⁴

Whether the master is liable for exemplary damages, where the wrongful act was not authorized or ratified, is a question on which the courts disagree. Some courts have recognized the fiction of identity to the extent of holding the master liable;²⁵ while other courts, "more impressed by the monstrosity of the result than by the *elegantia juris*, have peremptorily declared that it was absurd to punish a man who had not been to blame,"²⁶ and hold that he is not liable beyond compensatory damages.²⁷

LIABILITY OF PRINCIPAL FOR TORT OF AGENT—IN GENERAL.

64. The principal is liable for the tort of his agent (not arising in a false representation) committed when acting in the course of his employment and in furtherance of it.

SAME—FRAUD.

65. The principal is liable for the fraud of his agent, committed for the principal's benefit, when the false representation by means of which the fraud is committed is made as an inducement to a third person in a transaction which is within the scope of the agent's actual authority, or which is within the scope of his apparent

²⁴ *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

²⁵ *Goddard v. Railway*, 57 Me. 202, 2 Am. Rep. 39; *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 Miss. 395, 452, 453; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 18 Pac. 609, 59 Am. Rep. 571.

²⁶ 5 Harv. L. R. 21-22.

²⁷ *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; *Hagan v. Railroad Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824; *Cleghorn v. Railroad Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 700; *Malsenbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; *Warner v. Pacific Co.*, 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327.

authority, unless the person dealing with the agent and injured by the fraud has notice that the transaction or the representation is unauthorized.

SAME—FRAUD NOT FOR PRINCIPAL'S BENEFIT—ESTOPPEL.

66. In some jurisdictions it is held that when the principal has clothed the agent with power to do an act resting upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, of the existence of which the execution of the power is itself a representation, a third person dealing with the agent in good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying the authority of the agent to make it, to such person's prejudice; and consequently that if the agent exercises the power when such fact does not exist, and fraudulently, the principal is answerable in tort to the person injured by the fraud, although it was committed by the agent for his own benefit or for the benefit of some person other than the principal.

Liability of Principal for Tort of Agent in General.

The rule which governs the liability of the principal for the torts of his agent is usually declared to be the same as that which governs the liability of the master for the torts of his servant; but in cases involving fraud this statement, it is believed, requires qualification.

An agent, as distinguished from a servant, is a person authorized by another to act on his behalf in bringing him into legal relations with third persons. He is employed, as has already been said,¹ to represent his employer in doing acts the object of which is, and which are of a nature, to bring him into contractual relations—as by making offers, representations, and promises—and in doing acts the object of which is, and which are of a nature, to affect his existing contractual and other legal relations, by way of performance

and discharge of his obligations and enforcement of his rights. It is his function to create new relations, usually by inducing third persons to act, and not ordinarily to perform on his employer's behalf other acts, which can impose liability upon the employer, if at all, only by reason of the negligent or wrongful manner of their performance.² He may, indeed, have authority to perform an act of this character as an incident to the performance of his peculiar function, as where a solicitor or an attorney has authority, as an incident to the enforcement of his client's right of action, to cause an arrest or levy to be made;³ and one and the same person may be employed both as an agent and as a servant, with a consequent broadening of the field of employer's liability in tort. Put where a person is employed merely as an agent, his power of subjecting his employer to liability for torts is comparatively narrow. In most cases, an agent's tort arises only in a false representation, and hence the main question in respect to the principal's liability in tort relates to fraud.⁴ Before taking up this question, it will be convenient to consider the principal's liability for other torts.

Same—Employment as Agent and Servant.

Where the same person is employed as a servant and an agent, the employer, as master, is, of course, liable for the acts of the servant as in other cases. Thus, if a person is employed to sell goods or to make other contracts, and is intrusted with a wagon to be used in prosecuting the business of his employer, and by the terms of the employment he is to be subject to the employer's direction and control, he is both a servant and an agent, and for his negligence in driving, while he is acting in the course of the employment, the employer is responsible.⁵ Illustrations of the employer's liability as master, where the person employed is

² Ante, p. 7.

³ Post, p. 281.

⁴ Ante, p. 8.

⁵ *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; *Mulvehill v. Bates*, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796. See, also, *Patten v. Rea*, 2 C. B. (N. S.) 606.

servant as well as agent, are frequent in cases of libel,⁶ false imprisonment,⁷ malicious prosecution,⁸ and many other torts.⁹ The wrongful act must, of course, be committed in the course of and within the scope of the employment.¹⁰ In many of the cases here cited the master and principal was a corporation; for the rule now prevails that a corporation is liable for the torts of its servants and agents committed in the course of the employment to the same extent as a natural person, and may be liable for malicious wrongs.¹¹

⁶ *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202, 16 L. Ed. 73; *Andres v. Wells*, 7 Johns. (N. Y.) 260, 5 Am. Dec. 267; *Bruce v. Reed*, 104 Pa. 408, 49 Am. Rep. 536; *Hoboken Printing & Publishing Co. v. Kahn*, 59 N. J. Law, 218, 35 Atl. 1053, 59 Am. St. Rep. 585; *Bacon v. Railroad Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; *Allen v. Publishing Co.*, 31 Wis. 120, 50 N. W. 1093; post, p. 279.

⁷ *Lynch v. Railroad Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Palmer v. Railway Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824.

⁸ *Reed v. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Kruevitz v. Railroad*, 140 Mass. 573, 5 N. E. 500; *Turner v. Insurance Co.*, 55 Mich. 236, 21 N. W. 326; *Copley v. Sewing-Mach. Co.*, 2 Woods, 494, Fed. Cas. No. 3,213.

Not liable where for a purpose personal to the agent. *Larson v. Association*, 71 Minn. 101, 73 N. W. 711.

⁹ Where the superintendent of defendant's factory, who had general charge of the business, gave notice to other manufacturers not to employ plaintiff, who had been in the service of defendants as an apprentice under indentures erroneously supposed to be valid, the superintendent supposing that plaintiff might lawfully be reclaimed, and that others might not lawfully employ him, it was held that the acts of the superintendent were within the scope of his employment, and that defendants were liable for his wrongful act in preventing plaintiff from getting work. *Blumenthal v. Shaw*, 23 C. C. A. 590, 77 Fed. 954.

¹⁰ *Poulton v. London & S. W. Ry. Co.*, L. R. 2 Q. B. 534; *Abraham v. Deakin* [1891] 1 Q. B. 516; *Mulligan v. Railway Co.*, 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539.

¹¹ *Philadelphia, W. & B. R. Co. v. Quigley*, 21 Wall. (U. S.) 202, 16 L. Ed. 73; *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct.

For example, where a person was employed as a ticket agent in the ticket office of the defendant railway company, subject to the general control and supervision of the company's general passenger agent, and it was part of the agent's duty to post in the office notices pertaining to the business there carried on, and he posted an extract from a newspaper which was a libel upon the plaintiff, a neighboring ticket broker, indicating that he was not a safe and reliable person from whom to buy tickets, and calculated to diminish his income and thereby increase that of the defendant from the sale of tickets, it was held that there was evidence that the act was done by the agent in the course of his business as a servant of the defendant, and that if it was so done the defendant was liable.¹² So, where it is the duty, or at least within the implied authority, of a ticket agent, in the protection of the company's interests, to recover the employer's property, and the agent, erroneously believing that a purchaser of a ticket has passed a counterfeit coin upon him, and thus obtained a ticket and good money in change, causes the purchaser to be arrested, the company is responsible for the false imprisonment.¹³ Such cases shade into those in which it cannot be said that the relation of master and servant exists, but in which the wrongful act is committed in

1055, 30 L. Ed. 176; *Goodspeed v. Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Nims v. Boys' School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; *Clark, Corp.* 193, 523; *Jaggard, Torts*, 167.

¹² *Fogg v. Railroad Corp.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583.

¹³ *Palmerl v. Railway Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632.

But if a ticket agent, in order to perform a supposed duty to the community, accepts money which he suspects to be counterfeit, and then causes the arrest, he is not acting in the course of his employment, and the company is not answerable. *Mulligan v. Railway Co.*, 129 N. Y. 506, 20 N. E. 952, 14 L. R. A. 791, 28 Am. St. Rep. 539. See, also, *Allen v. L. & S. W. Ry.*, L. R. 6 Q. B. 65; *Abraham v. Deakin* [1891] 1 Q. B. 518; *Baltimore & Y. Turnpike Road v. Green*, 86 Md. 161, 37 Atl. 642.

the performance, or attempted performance, of an act specifically commanded, or which is within the express or implied authority of the agent as an incident to the enforcement of the principal's rights against the person with whom the agent is authorized to deal.¹⁴

Same—Wrongful Performance of Act within Agent's Authority.

As has been stated, the liability of the employer for an act which he has commanded does not depend upon the peculiar relation of master and servant. Such liability exists even when the act is brought about by the employment of an independent contractor.¹⁵ No doubt the distinction between a servant and an independent contractor is somewhat arbitrary, as well as vague, resting on "no more profound or logical reason" than the practical necessity of placing a limit somewhere upon the identification of employer and employed.¹⁶ For whatever reason it may be, the law declares that in acting in the course of his employment the contractor does not represent his employer, and that a servant does represent him. But let it once be established that the person employed does act in what the law has seen fit to regard as a representative capacity, the rule determining the liability of the employer for his torts is, in all cases not involving fraud, the same.

This holds true even when the authority is merely a specific command to do a single act. For example, if a person, being commanded by another to go to a certain place and get lumber belonging to him, by mistake takes lumber belonging to another, the person who gave the command is liable for the

¹⁴ Caswell v. Cross, 120 Mass. 545.

Evidence that the defendant in an action for malicious prosecution employed a person to search for property he had lost, and to take all legal steps necessary for its recovery, and that such person charged plaintiff with larceny of the property, and caused his arrest, does not sustain a verdict for plaintiff. Murrey v. Kelso, 10 Wash. 47, 38 Pac. 879.

¹⁵ Ante, p. 270.

¹⁶ See 5 Harv. L. R. 14-16.

trespass,¹⁷ and he would also be liable if in taking the right lumber the person used unlawful force. Here the scope of the employment is, of course, very narrow.

And so when the relation is that of principal and agent in the narrow sense, if, in the course of the employment and in furtherance of it, in performing or attempting to perform some act which is within the agent's authority as incident to his authority to create a new relation, he commits a tort, the principal is answerable. Thus, if a solicitor or attorney at law, who has authority as such in the conduct of a suit to cause the defendant to be arrested or his property to be taken on execution, does so when the particular circumstances do not justify the arrest¹⁸ or the seizure,¹⁹ the

¹⁷ *May v. Bliss*, 22 Vt. 477. See, also, *Andrus v. Howard*, 36 Vt. 248, 84 Am. Dec. 680; *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *Maier v. Randolph*, 33 Kan. 340, 6 Pac. 625.

¹⁸ *Collett v. Foster*, 2 H. & N. 356.

In this case, judgment having been entered up against plaintiff, on a warrant of attorney, for £60, given to secure a debt payable by installments of which less than £20 was due, defendant's attorney caused plaintiff to be arrested under a *ca. sa.*, indorsed to levy £21 10s. Held, that defendant was liable in trespass for the act of the attorney in improperly causing plaintiff to be arrested. "I think," said Pollock, C. B., "there is a great distinction between employing an attorney who represents the parties in a suit and employing a contractor to do work, such as building a house. In the latter case the employer is not liable for the acts of the contractor * * *; but * * * a person is liable for the acts of his attorney in the conduct of a suit at law brought under his authority. He gives to the attorney the right to represent him, and he is responsible for whatever the attorney does." See, also, *Bates v. Pilling*, 6 B. & C. 38.

¹⁹ *Foster v. Wiley*, 27 Mich. 245, 15 Am. Rep. 185, holding a client liable in trespass for taking property on execution issued by a justice of the peace at the instance of the attorney after an appeal was perfected. A client who puts his claim in the hands of an attorney for suit, said Cooley, J., is presumed to authorize such action as the latter in his superior knowledge of the law may decide to be legal; and whatever adverse proceedings the attorney may take are to be considered, so far as affects the defendant in the suit, as approved

client is liable for the trespass. The scope of the employment of such an agent also is very narrow. For example, where a solicitor, by an indorsement on a writ of execution directing the sheriff to levy on the goods of the judgment debtor, misled the sheriff by giving the address of the debtor's father, whose goods were, in consequence, wrongfully seized by the sheriff, it was held that the client was liable; it being part of the duty of the solicitor, in the ordinary course of the employment, to indorse the writ.²⁰ But where a solicitor on issuing a writ verbally directed the sheriff to seize particular goods, which were not the debtor's property, it was held that the client was not liable, since it was not within the scope of his implied authority as solicitor to direct the sheriff to seize particular goods.²¹

Of course, if a third person, dealing with the agent within the scope of his authority, intrusts to him property which the agent misappropriates²² or negligently injures,²³ the principal is answerable for the loss or injury.

Liability for Fraud—In General.

A false representation may be the inducement to a contract or it may be part of a contract, and thus give rise to a right of action for breach of the contract. A false representation may also create an estoppel. And, finally, a false representation, if fraudulent, may give a right to rescind a contract

in advance by the client, and his acts, even if they prove unwarranted in law, although as to trespasses on third parties the rule is different.

Cf. *Howell v. Caryl*, 50 Mo. App. 444; *Kirksey v. Jones*, 7 Ala. 622.

²⁰ *Morris v. Salberg*, 22 Q. B. D. 614.

"If he is his agent to do the particular act, the client must stand the consequences if he acts inadvertently or ignorantly." *Jarmain v. Hooper*, 6 M. & G. 827, per Tindal, C. J.

²¹ *Smith v. Keal*, 9 Q. B. D. 340. See, also, *Averill v. Williams*, 4 Denio (N. Y.) 295, 47 Am. Dec. 252; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519.

²² *Thompson v. Bell*, 10 Ex. 10.

²³ *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516.

or a right of action in tort for deceit. An innocent misrepresentation, which is not a term of the contract, has ordinarily no effect upon it, though in certain classes of contracts it gives rise to a right of rescission, and it may sometimes be ground for granting or refusing equitable relief. Whenever, however, a party to a contract has been induced to enter into it by the fraud of the other party, the contract is voidable, at his option.²⁴ "Fraud," as the word is here used, is a false representation of a material fact, made with a knowledge of its falsity, or in reckless disregard of whether it is true or false, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it to his injury.²⁵ The same state of facts which is ground for an avoidance of the contract also gives rise to an action at common law for deceit, in which the defrauded party may recover such damages as he has suffered by reason of the false representation. It is not essential, however, that a representation, in order to give ground for an action for deceit, be made directly to the injured party;²⁶ nor is it essential that it be made as an inducement to the injured party to contract with the person making the representation; it is enough if it be made as an inducement to act, and he so acts in consequence, and thereby suffers damage.²⁷

Same—Deceit.

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit," said Willes, J., in the English case of *Barwick v. English Joint Stock Bank*,²⁸ "no

²⁴ Clark, Contr. 308 et seq.

²⁵ Clark, Contr. 324 et seq.; Jaggard, Torts, 558 et seq.; Tiffany, Sales, 111 et seq.

²⁶ *Barry v. Croskey*, 2 Johns. & H. 1, 22; *Langridge v. Levy*, 2 M. & W. 519; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *Bank of Montreal v. Thayer* (C. C.) 7 Fed. 623.

²⁷ *Langridge v. Levy*, 2 M. & W. 519.

²⁸ L. R. 2 Ex. 259. In this case plaintiff, who had been in the habit of supplying D., a customer of defendant bank, with oats on

sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit. * * * It may be said * * * that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."

This statement of the rule governing the principal's liability for fraud calls for explanation.²⁹ The rule declares

credit on a guaranty of defendant, refused to continue to do so except on a better guaranty. Defendant's manager accordingly promised in writing that if plaintiff would supply to D. oats which were needed by him to fulfill a government contract, the bank would honor D.'s check in plaintiff's favor in payment of the same, on receipt of the money from the government in payment under the contract, "in priority to any other payment except to this bank." D. then owed the bank £12,000, which fact was not communicated to plaintiff, who supplied oats to the value of £1,227. D. received £2,676 from the government, paid it into the bank, and drew a check in plaintiff's favor for the amount of the oats, which was dishonored, the bank claiming to retain the whole £2,676 in payment of D.'s debt. It was held that there was evidence for the jury that the manager knew and intended that the guaranty would be unavailing, and fraudulently concealed the fact that would make it so, and that the bank would be liable for such fraud. See, also, *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; *Swire v. Francis*, 3 App. Cas. 106; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317. Cf. *Addie v. Western Bank*, L. R. 1 Sc. & D. 145, 158, 166, 167.

²⁹ "The principle which governs such cases as these (*Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, and the cases following it) is not that the master is liable for the acts of his servant. It is the liability of the principal for the acts of his agent. * * * It seems to me, then, that *Barwick v. English Joint-Stock Bank* cannot be supported on the reasons given. * * * I think that any person who authorizes another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution

that the principal is liable for the wrongs of his agent or servant, committed in the "course of the service," or, as is commonly said, in the course of the employment. It is to be borne in mind, however, that when the wrong is fraud the person injured by the representation is dealing with the agent and by him induced to act, and is not merely acted upon; and that, as against third persons who deal with him without notice of limitations upon his authority, he has the powers usually confided to an agent of that character, which may exceed the authority actually conferred, while as against persons dealing with him with such notice his powers do not exceed his actual authority.⁸⁰ The rule, as applied to fraud, must be interpreted in the light of these considerations. The agent may perhaps be said to be acting in the course of his employment, although he exceeds his actual authority, so long as he does not exceed the usual powers of an agent of that character; but, although he be so acting, the third person dealing with him and injured by his fraud can thereby acquire no rights against the principal if he has notice that the transaction in which the representation is made, or the representation itself, is in fact unauthorized. On the whole, it seems to place the matter in a clearer light to discard the term "course of employment," and to substitute "scope of authority." The principal is liable for the fraud of his agent, committed for his benefit, in a transaction which is within the scope of the agent's actual authority, or which is within the scope of his apparent authority, unless the person dealing with him and injured by his fraud has notice that the transaction or the representation is unauthorized. Of course, in any case, if the third person knows that the representation is not true, he is not injured, and no fraud is committed; but

of the authority given, as much as he contracts for its absence in himself when he makes the contract." *Weir v. Bell*, 3 Ex. D. 238. 244, per Bramwell, L. J. See, also, *McNelle v. Cridland*, 168 Pa. 16, 31 Atl. 939.

⁸⁰ Ante, p. 180 et seq. See *Huffcut, Ag.* (2d Ed.) 10 et seq., 198 et seq.

this is aside from any question of agency. Second, the rule as stated declares that the fraud must be committed for the benefit of the principal. How far this is subject to qualification will be considered later.⁸¹

It follows that if, in furtherance of the business committed to him, the agent commits a fraud by making a false representation which belongs to the class of representations that, as against the person dealing with him, he must be deemed to have authority to make, the principal is answerable.⁸² Whether the principal is answerable, if the representation is made as an inducement to an authorized contract, but does not belong to a class of representations which he would be deemed to have authority to make as a term of the contract—as where an agent authorized to sell makes a representation which would not be binding as a warranty because such a warranty would be unusual—is a question upon which there has been difference of opinion.⁸³ In many cases where the

⁸¹ Post, p. 288.

⁸² *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

⁸³ *Udell v. Atherton*, 7 H. & N. 172.

In this case one employed by defendants to sell timber on commission sold plaintiff a defective mahogany log, which he fraudulently represented to be sound, defendants being unaware of the defect or of the representation. In an action for deceit the court directed a nonsuit, and the court in banc was equally divided whether the ruling should be sustained. In *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, Willes, J., disclaiming to overrule the opinions of Bramwell and Martin, BB., in *Udell v. Atherton*, who upheld the nonsuit, said: "It seems pretty clear that the division of opinion * * * arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time, in *Hern v. Nichols*, 1 Salk. 289—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is."

principal is held liable for the fraud of his agent made as an inducement to a sale, the question does not arise because the representation is of a class which the agent has apparent authority to make. An agent authorized to effect a sale of property "must be presumed to possess authority to make such representations in regard to its quality and condition as usually accompany such transactions."³⁴ The rule, however, in this country at least, is usually stated in broader terms, and it is declared that it is sufficient to charge the principal for the agent's fraud that the agent is acting in the business which he is authorized to transact, and that the representation is made in that transaction and as an inducement to the other party to act. Thus, where an agent is authorized to sell, his false representation concerning the property, made as an inducement to the purchaser, binds the seller, who is liable to the purchaser in an action of tort for deceit.³⁵

³⁴ *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 201, 5 L. R. A. 540, per Ruger, C. J. In this case it was held that, while a written contract for sale of goods by sample cannot be shown by oral evidence to be made with warranty when none is set out in the contract, the statements of the broker falsely recommending the quality are admissible to prove fraud. See, also, *Griswold v. Gebbie*, 128 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

³⁵ *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 35 Am. Dec. 332; *White v. Sawyer*, 16 Gray (Mass.) 586; *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Peebles v. Guano Co.*, 77 N. C. 233, 24 Am. Rep. 447; *Wolfe v. Pugh*, 101 Ind. 293; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940; *Gunther v. Ullrich*, 82 Wis. 220, 52 N. W. 88, 33 Am. St. Rep. 32; *Hopkins v. Insurance Co.*, 57 Iowa, 203, 10 N. W. 605, 42 Am. Rep. 41; *Lynch v. Trust Co. (C. C.)* 18 Fed. 486.

The representation must be made in the particular transaction. *Cate v. Blodgett*, 70 N. H. 316, 48 Atl. 281.

Contra (holding that an action for deceit will not lie against an innocent principal): *Kennedy v. McKay*, 43 N. J. Law, 288, 39 Am. Rep. 581; *State v. Fredericks*, 47 N. J. Law, 469, 1 Atl. 470; *Freyer v. McCord*, 165 Pa. 539, 30 Atl. 1024; *Keefe v. Sholl*, 181 Pa. 90, 37 Atl. 116.

So far as *Udell v. Atherton*, 7 H. & N. 172, and *Western Bank*

"While the principal may not have authorized the particular act [the representation], he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him."⁸⁶ "Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency."⁸⁷ If when the representation is made the agent is not engaged in a transaction within the scope of his authority, the principal is not answerable for it.⁸⁸ The principal cannot, however, reap the fruit of his agent's fraud and escape liability by denying the agent's authority; he cannot retain the benefits derived from the fraudulent conduct of the agent without being charged with the instrumentalities used to accomplish the purpose.⁸⁹

Fraud not for Principal's Benefit—English Rule.

In England it is clearly established that to make the principal liable the fraud must be committed by the agent not

v. Addie, L. R. 1 Sc. & D. Cas. 145, support this doctrine, they are opposed to the later English decisions.

⁸⁶ *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809, per Devens, J. The court also said: "The defendant contends that Rockwell was a special agent only, and that, as his authority extended only to the sale of this single tract of land, the defendant is not responsible for any representations Rockwell might have made, which he did not authorize. * * * There is no distinction in the matter of responsibility for the fraud of an agent authorized to do business generally and of an agent employed to conduct a single transaction, if in either case he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction."

⁸⁷ *Wolfe v. Pugh*, 101 Ind. 293.

⁸⁸ *Lamm v. Association*, 49 Md. 233, 33 Am. Rep. 246; *Second Nat. Bank v. Howe*, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; *Browning v. Hinkle*, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691.

⁸⁹ *Bennett v. Judson*, 21 N. Y. 238; *Krumm v. Beach*, 96 N. Y. 398; *Sunbury Fire Ins. Co. v. Humble*, 100 Pa. 495; *Busch v. Wil-*

merely in the course of the employment, but must be for the benefit of the principal; that is, in furtherance of his business.⁴⁰ Thus, where the secretary of the defendant company had, in conjunction with another, fraudulently issued certificates for debenture stock in excess of the amount the company was authorized to issue, and the plaintiffs, who had been applied to by customers for a loan on the security of transfers of some of this stock, were informed by the secretary, who was held out as such to answer such inquiries, that the transfers were valid, and that the stock which they proposed to transfer existed, and the plaintiffs accordingly lost their security, it was held in an action to recover damages for fraudulent misrepresentation that, the fraud being committed by the secretary for his own purposes and not for the benefit of the company, the defendant was not liable. "The secretary was held out by the defendants," said Lord Esher, "as

cox, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563; Ripley v. Case, 80 Mich. 261, 40 S. W. 46; Albitz v. Railway Co., 40 Minn. 476, 42 N. W. 394; Leavitt v. Sizer, 35 Neb. 80, 52 N. W. 832; Continental Ins. Co. v. Insurance Co., 2 C. C. A. 535, 51 Fed. 884.

Cf. Smith v. Tracy, 36 N. Y. 79; Baldwin v. Burrows, 47 N. Y. 199; ante, p. 65 et seq.

A joint owner of real estate, who consents to the listing thereof by his co-owner with a real-estate agent for sale, receives part of the consideration, and never repudiates the sale made by the agents after discovering that they were guilty of fraud, is estopped to deny connection with the fraud, but will be held liable only to the extent of the benefit actually received. Alger v. Anderson (C. C.) 78 Fed. 729.

⁴⁰ British Mutual Bank v. Charnwood Forest Ry., 18 Q. B. D. 714; Thorne v. Heard [1895] A. C. 495, 64 L. J. Ch. 652, affirming [1894] 1 Ch. 599; Shaw v. Port Philip Gold Mining Co., 13 Q. B. D. 103, seems to be no longer law; Bowstead, Dig. Ag. art. 100.

Where the secretary of a company, to assist a shareholder in carrying out a fraud, falsely certified that certificates had been deposited to meet certain transfers, the company was not liable to the transferee for the fraud; following Grant v. Norway, 10 C. B. 665. George Whitechurch, Limited, v. Cavanagh, 85 L. T. (N. S.) 349 [1892] A. C. 117.

a person to answer such questions, * * * and if he had answered them falsely on behalf of the defendants, he being then authorized by them to give answers for them, it may well be that they would be liable. But * * * he did not make the statements for the defendants, but for himself. He had a friend whom he desired to assist, * * * and, as he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms that to bind the principal the agent must be acting 'for the benefit' of the principal. This, in my opinion, is equivalent to saying that he must be acting 'for' the principal. * * * I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest."⁴¹

Same—Rules in This Country.

The requirement that the fraud must be for the principal's benefit has been approved by some courts in this country.⁴² In other jurisdictions the liability of the principal has been maintained, where the fraud is not committed for the benefit of the principal, upon the ground of equitable estoppel. It is to be observed that in many cases where the principal is held answerable the fraud is necessarily for his benefit, and the question does not arise, as where the agent is authorized to effect a sale, and the false statement is made as an inducement to it, and consequently in furtherance of the principal's business. The question is presented (1) in cases where the agent has authority to furnish information in answer to inquiries, and fraudulently furnishes false information for his own benefit, or for the benefit of some person other than his principal; and (2) in cases where the agent has authority to do an act in the event of the existence of some extrinsic fact resting peculiarly within his own knowledge, and for his own benefit, or for the benefit of some person other than the

⁴¹ *British Mutual Bank v. Charnwood Forest Ry.*, 18 Q. B. D. 714.

⁴² *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Dun v. Bank*, 7 C. C. A. 152, 58 Fed. 174, 23 L. R. A. 687.

principal, does the act, knowing that the fact does not exist.

In a case of the former character, where the local agent of the defendants, constituting a so-called mercantile agency, knowingly gave false information concerning the standing of a merchant with intent to mislead the plaintiff and benefit the merchant, it was held that the defendants were liable for the fraud.⁴³ The case was reversed, but partly on another ground.⁴⁴ This exact question has seldom been presented, but the answer perhaps depends upon the same considerations which are involved in cases of the latter character, namely, whether, the truth or falsity of the representation lying peculiarly within the knowledge of the agent, the principal is not estopped as against a third person dealing with the agent, and relying upon the truth of the representation, not merely from denying the truth, but from denying the authority of the agent to make it.

In cases of the latter character the liability of the principal for the agent's fraud is in many jurisdictions maintained upon the ground of an equitable estoppel, for reasons which have already been somewhat discussed in considering the liability of the principal for contracts.⁴⁵ The principle which is there recognized was stated in a leading case⁴⁶ as follows: "Where the principal has clothed his agent with power to do an act resting upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." Where the act thus authorized is a contract, the effect of the estoppel is to preclude the principal from denying the truth of the represen-

⁴³ City Nat. Bank v. Dun (C. C.) 51 Fed. 160.

⁴⁴ Dun v. Bank, 7 C. C. A. 152, 58 Fed. 174, 23 L. R. A. 687.

⁴⁵ Ante, p. 199.

⁴⁶ New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

tation, and consequently from escaping liability upon the contract. And, since the person dealing with the agent may rely upon the representation, the principal is equally estopped from denying the authority of the agent to make it, when sought to be charged for the agent's fraud in an action of tort. If the defendant seeks to repudiate the representation because it is false, the plaintiff may answer: "You intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be exercised without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case."⁴⁷

In accordance with this principle, it has been held that where the officer of a corporation authorized to issue certificates of stock fraudulently and for his own benefit issues certificates in excess of the amount which the corporation has power to issue, and by collusion with the transferee causes them to be sold to a bona fide purchaser for value, the corporation is estopped to deny the authority of the agent to make the representation that the stock was not issued in excess of its authorized amount. The purchaser cannot, indeed, by estoppel, acquire the rights of a stockholder, for the stock, being issued in excess of the charter powers, is void; but he may recover damages against the principal for the agent's fraud in an action of tort.⁴⁸ So, when the secretary and treasurer of a corporation, who was also its agent for the transfer of stock, and authorized to countersign and issue stock when signed by the president, forged the name

⁴⁷ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, per Dwight, J.

⁴⁸ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

of the latter, and fraudulently issued a certificate to one who was associated with him, it was held that the corporation, upon its refusal to recognize the certificate as valid, was liable in damages to a bank which accepted the certificate in good faith as security for a loan.⁴⁹ It is only a bona fide purchaser without notice who can assert the estoppel; a purchaser directly from the agent in whose name the certificate is issued, and who is acting in his individual capacity in the sale, is bound at his peril to investigate his title, and to assure himself that the legal prerequisites to the issuance of the stock have been fulfilled.⁵⁰ And the agent must be acting within an apparent authority to issue certificates. Thus, where a corporation delivered to its manager surrendered certificates containing blank indorsements, with di-

⁴⁹ *Fifth Ave. Bank v. Railroad Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712. "It is true," said the court, "that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate apparently made in the course of his employment, as agent of the company, and within the scope of the general authority conferred upon him; and the defendant is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them." See, also, *Allen v. Railroad Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Tome v. Railroad Co.*, 39 Md. 36, 17 Am. Rep. 540; *Western Maryland R. Co. v. Bank*, 60 Md. 36; *Manhattan Beach Co. v. Harned* (C. C.) 27 Fed. 484; *Appeal of Klisterbock*, 127 Pa. 601, 18 Atl. 381, 14 Am. St. Rep. 868. See *Clark, Corp.* 437-440, 525-527.

⁵⁰ *Moores v. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; *Farrington v. Railroad Co.*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222; *Bank of New York Nat. Banking Ass'n v. Trust Co.*, 143 N. Y. 559, 38 N. E. 713.

rections to cancel them, and he transferred them to a purchaser in good faith, the corporation was not chargeable with the fraud.⁵¹

This principle has also been applied, in effect, to the case of a local agent of a telegraph company who was also the local agent of an express company at the same place, and who, by sending a forged dispatch to a merchant requesting him to forward money to his correspondent at the former place, caused the money to be sent by express, and intercepted and converted the money. It was held that the telegraph company was liable, it being the business of the agent to send dispatches of a similar character, and the plaintiff being unable to know the circumstances that made the particular act wrongful and unauthorized.⁵²

The application of the principle to bills of lading fraudulently issued by a shipping agent without receipt of the goods has already been considered. Such cases have usually arisen upon the attempt of the innocent consignee or indorsee for value to hold the principal liable upon the contract, and not in tort for the agent's fraud, but if the action is maintainable in the one form it would seem to be maintainable in the other. The conflicting decisions have been cited elsewhere.⁵³ In the Supreme Court of the United States it has been held that the action is maintainable neither in contract nor on the ground of tort.⁵⁴

⁵¹ *Knox v. American Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700. See, also, *Manhattan Life Ins. Co. v. Railroad Co.*, 139 N. Y. 146, 34 N. E. 776; *Hill v. Publishing Co.*, 154 Mass. 172, 28 N. E. 142, 13 L. R. A. 193, 26 Am. St. Rep. 230.

⁵² *McCord v. Telegraph Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636. See, also, *Bank of Palo Alto v. Cable Co. (C. C.)* 103 Fed. 841.

⁵³ Ante, p. 200.

⁵⁴ *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991. Fuller, C. J., said: "The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and, being without it, the company, which

Same—Action for Deceit—Knowledge of Principal.

Since it is an essential element of deceit that the person making the representation have knowledge of its falsity or else make it in reckless disregard whether it be true or false, the difficulty of holding a personally innocent principal has presented itself. As we have seen, it is now generally held that an innocent principal is liable if the agent, while engaged in a transaction which as against the person injured is within the scope of his authority, makes the representation fraudulently.⁵⁵ The principal difficulty which remains lies in charging an innocent principal where the agent without authority, but innocently, represents a fact to be true which the principal knows is false. The various cases which may arise may be stated as follows:⁵⁶

If the principal knows the representation to be false and authorizes it to be made, he is clearly liable, whatever the knowledge of the agent. And if the principal, knowing the contrary of the representation to be true, does not authorize it, but the agent, in a transaction which must be deemed to be within the scope of his authority, makes the representation knowing it to be false, or recklessly, the principal is liable.⁵⁷ In this state of facts, if the agent thinks the representation true, the question is presented whether the principal is liable. That he is liable if he fraudulently keeps back the knowledge from the agent is admitted;⁵⁸ but, if he holds the knowledge back inadvertently, the question is not free from doubt. This question was considered in the famous case of *Cornfoot v. Fowke*,⁵⁹ where an agent employed to let a house, on being asked by an intending lessee whether

derived no benefit from the unauthorized and fraudulent act, cannot be made responsible."

⁵⁵ See cases cited ante, pp. 286-288.

⁵⁶ See Jaggard, Torts, 267, note 13, following Fraser, Torts, 131.

⁵⁷ Per Parke, B., *Cornfoot v. Fowkes*, 6 M. & W. 358. And see cases cited ante, pp. 286-288.

⁵⁸ Admitted in *Cornfoot v. Fowkes*, 6 M. & W. 358.

⁵⁹ 6 M. & W. 358.

there was any objection to it, said there was not, whereas, unknown to the agent, but known to the principal, the adjoining house was a brothel, and on the faith of the representation an agreement for a lease was entered into. In an action upon the agreement by the lessor for nonperformance, the lessee pleaded fraud. It was held that the plea was bad, although it would have been good if the principal had authorized the representation, or had purposely employed an ignorant agent, intending that the question, if asked, should be answered in the negative. Alderson, B., said: "I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any—the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made * * *; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer bona fide." Some dicta adverse to this decision are to be found.⁶⁰ If the principal is to be held in such a case, it is submitted that it should be upon the ground that the withholding from the agent knowledge so material, and upon which the agent is likely to be questioned, is such reckless disregard of consequences on the part of the principal as to be justly deemed equivalent to fraud, much as a false statement made in reckless disregard whether it be true or false is deemed to be made fraudulently.⁶¹

We have been considering the various phases that may present themselves when the principal knows that the con-

⁶⁰ See *Fuller v. Wilson*, 3 Q. B. 68, 1009; *Feret v. Hill*, 15 C. B. 207; *National Exchange Co. v. Drew*, 2 Macq. 103; *Ludgater v. Love*, 44 L. T. (N. S.) 694; *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46.

"I should be sorry to have it supposed that *Cornfoot v. Fowkes* turned upon anything but a point of pleading." Per Willes, J., in *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259.

⁶¹ See *Pollock (Webb's) Torts*, 386; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540. But see *Derry v. Peek*, 14 App. Cas. 337.

trary of the representation is true. If he believes the fact to be as represented, and the agent makes the representation in that belief, whether pursuant to express authority, or in a transaction within his apparent authority, the principal is not liable; but in either case, if the agent makes the representation knowing it to be false, or recklessly, the principal is liable.⁶² In many cases, of course, the principal is without knowledge as to the facts represented, and if in such case the agent makes the representation knowing it to be false, or recklessly, the result must be the same; although he is not liable if the agent reasonably believes it to be true, unless the principal, without knowing whether it were true or false, authorized it to be made. Thus, the principal is liable in all possible cases, unless it be the case considered in *Cornfoot v. Fowke*, except when both he and the agent believe the agent's representation to be true.

LIABILITY FOR CRIMES.

67. The principal, or master, is not criminally liable for the act of his agent, or servant, unless he has actually previously authorized or assented to it.

EXCEPTIONS: (a) In cases of libel and nuisance the master is liable, under certain circumstances, for the act of his servants upon the ground of his negligence in failing to exercise proper control over them;

(b) Under some statutes the principal or master is liable for prohibited acts notwithstanding that they are done by his agents or servants without his authority or contrary to his instructions.¹

In General.

As a rule the principal, or master, is not criminally liable for the acts of his agent or servant which he has not previously authorized or assented to.² He cannot become liable

⁶² See cases cited ante, pp. 286-288.

§ 67. ¹ The discussion of the principal's liability for his agent's crimes follows Clark, *Crim. Law* (Tiffany's 2d Ed.) 117 et seq.

² *Chisholm v. Doulton*, 22 Q. R. D. 734, 741.

by ratification,³ nor does the fact that an act was committed by the agent or servant in the course of the employment and for his benefit render the employer liable.⁴ Criminal liability must rest, except in exceptional cases, upon the ground of assent, for otherwise the mental element necessary to make the act a crime is lacking.

Agent's Act as Evidence of Authority.

From the mere fact of employment to conduct a lawful business there can be no presumption of authority to commit unlawful acts.⁵ It has, however, often been declared that under some circumstances the performance of an unlawful act by an agent or servant in the course of his employment upon the employer's premises is sufficient to raise a presumption of fact that the act was authorized. Thus, where the defendant was indicted for publishing a libel (Juni-us' Letters) in a magazine, which professed to be printed by him, and was sold in his shop by his servant, it was held that this was prima facie evidence of publication by the defendant.⁶ So it has been held of a sale of spirituous liquors by a clerk in the absence of the principal, in violation of a statute forbidding sale without license.⁷ It seems, however, that while such evidence may warrant an inference of authority, which would justify a jury in so finding, it is not correct to say that

³ *Morse v. State*, 6 Conn. 9. Cf. *Reg. v. Woodward*, 9 Cox, C. C. 95.

⁴ *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Com. v. Briant*, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; *State v. Bacon*, 40 Vt. 456.

⁵ *Com. v. Briant*, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; *State v. Mahoney*, 23 Minn. 181; *State v. Burke*, 15 R. I. 324, 4 Atl. 761.

⁶ *Rex v. Almon*, 5 Burrows, 2686.

⁷ *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Barnes v. State*, 19 Conn. 398; *Anderson v. State*, 22 Ohio St. 305; *State v. McCance*, 110 Mo. 398, 19 S. W. 648 (under statute providing that agent's sale should be taken to be act of principal); *State v. Weber*, 111 Mo. 204, 20 S. W. 33; *Fullwood v. State*, 67 Miss. 554, 7 South. 432.

it creates a presumption of fact.⁸ Whatever the weight of such evidence, unless it is made conclusive by statute, it may be shown in defense that the act was in fact unauthorized, as by proof of general instructions to the contrary.⁹

Negligence.

In certain cases, in exception to the general rule, the master is held liable for the acts of his servant upon the ground of negligence. In libel an exceptional responsibility has been held to rest upon booksellers and publishers respecting publications issued from their establishments in the regular course of business. In England evidence of such a sale was at one time held to be conclusive evidence of authority, upon the ground that it was necessary to prevent the escape of the real offender behind an irresponsible party.¹⁰ In this country the liability of the master has been placed upon the ground of negligence or culpable neglect to exercise proper care and supervision over persons in his employ. It is therefore open to him in defense to show that the publication was made under such circumstances as to negative any inference of privity, connivance, or want of ordinary care, as by showing that he was absent, or confined by sickness, and unable to exercise proper care and supervision.¹¹ So, in nuisance, a large responsibility has been recognized. Liability in such cases may sometimes rest on the ground of

⁸ No such presumption is created by a single unlawful sale to an habitual drunkard or a minor. *State v. Mahoney*, 23 Minn. 181.

⁹ *Com. v. Wachendorf*, 141 Mass. 270, 4 N. E. 817; *Com. v. Joslin*, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449.

Otherwise if it appeared that the instructions were merely colorable. *State v. Mueller*, 38 Minn. 497, 38 N. W. 691.

¹⁰ *Rex v. Gutch*, Moody & M. 433; *Rex v. Walter*, 3 Esp. 21.

By the earlier decisions it was held only *prima facie*. *Rex v. Almon*, 5 Burrows, 2686.

By statute the accused may show that the publication was not made by authority, and was not due to want of due care. 6 & 7 Vict. c. 96.

¹¹ *Com. v. Morgan*, 107 Mass. 199.

responsibility for the reasonable and natural consequence of acts commanded—a responsibility which attaches even when the relation is that of employer and independent contractor.¹²

Statutory Offenses.

Many statutes impose punishment irrespective of any intent to violate them, and notwithstanding ignorance or mistake of fact which in the case of common-law crimes would be an excuse.¹³ There are statutes, most of them having for their object the regulation of the sale of intoxicating liquors, which prohibit the doing of certain acts by certain classes of persons or in certain places, and which either expressly or by implication provide that such persons or the proprietors of such places shall be responsible for such acts, although committed without their knowledge, or even contrary to their instructions, by their subordinates. Such are many of the statutes prohibiting the sale of intoxicating liquors without license, or in violation of the conditions of the license, or to minors or intoxicated persons, or prohibiting saloons to be kept open on Sunday or after a certain hour, or forbidding the windows of saloons to be curtained. It requires a clear expression of intention on the part of the legislature to justify a construction of a statute as imposing a penalty upon a person for an act which he has not authorized or has forbidden, and, unless the intention clearly appears, the rule that a man is not criminally liable for acts which he has not authorized must prevail;¹⁴ but where the statute does so provide

¹² *Rex v. Medley*, 6 Car. & P. 202. See *Rex v. Dixon*, 3 M. & S. 11.

In *Reg. v. Stephens*, L. R. 1 Q. B. 702, it was held that the owner of a quarry was liable for a nuisance consisting in obstructing a public river by casting into it stone and rubbish, although this was done by his workmen without his knowledge and against his general orders, and, by reason of his age, he was unable to exercise supervision. The case was explained on the ground that the proceeding, although in its form criminal, was in its nature civil.

¹³ Clark, *Crim. Law* (2d Ed.) 84.

¹⁴ *Com. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Com. v. Wachendorf*, 141 Mass. 270, 4 N. E. 817.

it is valid.¹⁵ There is much conflict, real or apparent, in the decisions, and different constructions have been placed by different courts upon similar enactments. The question for determination in each case must be whether it was the intention of the statute to require persons of the designated class to see to it, at their peril, that the prohibited acts are not committed.¹⁶

¹⁵ *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; *People v. Blake*, 52 Mich. 566, 18 N. W. 360; *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Com. v. Kelley*, 140 Mass. 441, 5 N. E. 834; *Carroll v. State*, 63 Md. 551, 3 Atl. 29; *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315; *Boatright v. State*, 77 Ga. 717; *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698; *Noecker v. People*, 91 Ill. 494; *Mogler v. State*, 47 Ark. 109, 14 S. W. 473.

¹⁶ Under a statute requiring saloons to be closed on Sunday, it was held that the penalties of the statute were denounced against the person whose saloon is not kept closed, and that no other fact than that it was not kept closed was necessary to complete the offense. *State v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270. Cf. *People v. Parks*, 49 Mich. 333, 13 N. W. 618, and *People v. Welch*, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385, where the statutes involved were differently construed.

Under a statute providing that no licensee of a saloon shall place or maintain, or permit to be placed or maintained, on the premises, any screen or curtain, it was held that a licensee was liable for a screen or curtain which a servant maintained in his absence against his orders, on the ground that the statute by fair intendment made the licensee responsible for the condition of his premises, and liable whether the prohibited act was done by him personally or by his agent left in charge of the business. *Com. v. Kelley*, 140 Mass. 441, 5 N. E. 834. Cf. *Com. v. Wachendorf*, 141 Mass. 270, 4 N. E. 817.

CHAPTER XII.

LIABILITY OF THIRD PERSON TO PRINCIPAL.

- 68. Contract—Contract in Name of Principal.
- 69. Defenses.
- 70. Contract on Behalf of Undisclosed Principal.
- 71. Defenses Against Undisclosed Principal.
- 72. Quasi Contract.
- 73-76. Torts—Property Wrongfully Disposed of.
- 77. Following Trust Funds.
- 78. Fraud and Decelt.
- 79. Collusion with Agent.
- 80. Loss of Service Caused by Wrongful Act.

CONTRACT—CONTRACT IN NAME OF PRINCIPAL.

68. A party to a contract made by an agent in the name of his principal is liable thereon to the principal, who alone may maintain an action thereon.

SAME—DEFENSES.

69. In an action by the principal upon such contract, the fraud, misrepresentation, or knowledge of the agent may be set up by way of defense in the same manner as the fraud, misrepresentation, or knowledge of the principal might have been if he had himself made the contract.

Since the principal is bound by a contract made in his name by an agent acting within the scope of his authority, a reciprocal obligation arises in the principal's favor against the other party to the contract, and the principal, and he alone, may maintain an action to enforce it.¹ What contracts are to be deemed made in the name of the principal will be con-

§§ 68-69. ¹ *Fairlie v. Fenton*, L. R. 5 Ex. 169; *Lamson & Goodnow Mfg. Co. v. Russell*, 112 Mass. 387; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359; *Story, Ag.* § 419.

sidered hereafter.² And although the contract when made be unauthorized, the principal becomes bound by ratifying it, and in that event he, and he alone, may maintain an action against the other party upon the contract.³

Defenses.

The principal, while entitled to the benefits of the contract, must take it subject to its attendant burdens. If it contains any terms which are unauthorized, the principal must adopt it as it was made, or not at all.⁴ If the other party was induced to enter into it by the agent's fraud, the other party may defend upon that ground.⁵ The principal is bound by the agent's knowledge, and the effect of imputing the knowledge of the agent to him will, of course, frequently be to render the contract subject to defense.⁶

CONTRACT ON BEHALF OF UNDISCLOSED PRINCIPAL.

70. A party to a contract made by an agent in his own name on behalf of a principal whose existence was undisclosed is liable thereon to the principal, who may maintain an action upon the contract in his own name, except—

EXCEPTIONS: (a) UNDISCLOSED PRINCIPAL EXCLUDED. Where, by the express or implied terms of the contract, the intention of the other party to contract only with the ostensible principal is indicated.

(b) CONTRACT UNDER SEAL. Where the contract is by deed or other instrument under seal.

(c) NEGOTIABLE INSTRUMENT. Where the contract is by negotiable instrument.

² Post, p. 220.

³ Ante, p. 81.

⁴ Ante, p. 61.

⁵ *Mullens v. Miller*, 22 Ch. D. 194; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Mundorff v. Wickersham*, 63 Pa. 87, 3 Am. Rep. 531; *Crump v. Mining Co.*, 7 Grat. (Va.) 352, 56 Am. Dec. 118; *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903.

⁶ Ante, p. 237.

SAME—DEFENSES AGAINST UNDISCLOSED PRINCIPAL.

71. In an action by the principal upon a contract made on his behalf by his agent in his own name, the other party is entitled to assert every equity and defense to which he would have been entitled as against the agent, and which existed at the time he first received notice of the existence of the agency.

Liability of Other Party to Undisclosed Principal.

Where a contract is made by an agent in his own name on behalf of an undisclosed principal, although the existence of the agency is unknown to the other party, the principal may hold him upon the contract and may sue upon it.¹ Subject to the superior right of the principal, the agent also may sue upon it.² "It is a general rule that whenever an express contract is made an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was

§§ 70-71. ¹ Garratt v. Cullum (1710) stated in Scott v. Surman, Willes. 400; Sadler v. Leigh, 4 Camp. 195; Spurr v. Cass, L. R. 5 Q. B. 656; Ford v. Williams, 21 How. (U. S.) 287, 16 L. Ed. 36; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 380, 12 L. Ed. 405; Darrow v. Produce Co. (C. C.) 57 Fed. 463; Huntington v. Knox, 7 Cush. (Mass.) 371; Foster v. Graham, 166 Mass. 202, 44 N. E. 129; Edwards v. Golding, 20 Vt. 30; Elkins v. Railroad Co., 19 N. H. 337, 51 Am. Dec. 184; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Nicoll v. Burke, 78 N. Y. 580; Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835; Baltimore Coal Tar & Mfg. Co. v. Fletcher, 61 Md. 288; Woodruff v. McGehee, 30 Ga. 158 (may recover on warranty); Ames v. Railroad Co., 12 Minn. 413 (Gil. 295); Barham v. Bell, 112 N. C. 131, 16 S. E. 903.

Where S., a solicitor, practiced in the name of S. & C., C. being also a solicitor, but acting as S.'s clerk, S., being real principal, was entitled to sue on a contract made in the name of the firm. Spurr v. Cass, L. R. 5 Q. B. 656.

Although the agent stipulates that he will not assign the contract, the undisclosed principal may sue on it. Prichard v. Budd, 22 C. C. A. 504, 76 Fed. 710.

² Post, p. 396.

made.”³ The right of the agent to sue, however, is subservient to that of the principal, unless the agent contracts in respect to goods upon which he has a lien;⁴ and, even if the agent has commenced an action, the principal may still intervene, and thereafter the right of the agent to sue ceases.⁵ So long as the other party is ignorant of the rights of the real principal, he may safely deal with the agent as principal; but, after receiving notice of the principal's rights, any settlement with or payment to the agent is at his peril. The right of the undisclosed principal to sue is not affected by the fact that the agent was acting under a *del credere* commission.⁶ As in the converse case of the principal's liability, parol evidence is admissible to show who is the real principal.⁷ “The rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts (1) that the act is done in the exercise, and

³ *Cothay v. Fennell*, 10 B. & C. 871.

In that case *Cothay* carried on business in London, others of the plaintiffs at Glasgow, and the rest at Manchester. The three firms agreed to be interested in a purchase of Barbary gum, *Cothay* to be actual purchaser, and he gave the order. It was contended that he alone could sue, but it was held the action was maintainable by all. “*Cothay* may be considered as agent for the Glasgow and Manchester houses,” said the court, “or they may be treated as dormant partners in this transaction; and a dormant partner in one instance may sue as well as a dormant partner in the general business of a mercantile house.”

⁴ If he has a lien on the goods as against the principal, the latter's right to sue on the contract is, while the claim of the agent is unsatisfied, subservient to that of the agent, and payment to or settlement with the agent is a discharge, notwithstanding notice not to pay or settle with the agent. *Hudson v. Granger*, 5 B. & Ald. 27. See *Bowstead*, Dig. Ag. art. 96.

⁵ *Sadler v. Leigh*, 4 Camp. 195.

⁶ *Hornby v. Lacy*, 6 M. & S. 166.

⁷ *Ford v. Williams*, 21 How. (U. S.) 287, 16 L. Ed. 36; *Darrow v. Produce Co.* (C. C.) 57 Fed. 463; *Huntington v. Knox*, 7 Cush. (Mass.) 371.

(2) within the limits, of the powers delegated; and these are necessarily inquirable into by evidence."⁸

The contract must, however, be on behalf of the principal solely, and not on behalf of him and another, as in the case of a sale by a factor of his own goods with those of the principal; for in such case, if the contract is entire and for a gross sum, the action must be upon the contract and in the name of the agent, and the principal can neither sever the contract nor maintain an action for the value of the portion belonging to him.⁹

Where Terms of Contract Exclude Undisclosed Principal.

While a party to a contract ordinarily takes the chances of the existence of an undisclosed principal, and is liable to be sued by such principal if it turns out that the contract is made on his behalf, every one has the right to elect with whom he will contract; and if his intention not to deal with any one but the person with whom he purports to contract is clearly indicated, the intention must have effect.¹⁰ The intention may be shown by the express terms of the agreement, or may be implied from the attendant circumstances. Thus, in the case of the charter party already referred to,¹¹ where the agent described himself as owner of the chartered vessel, it was held that the undisclosed principal and real owner was not entitled to show that the agent contracted on his behalf so as to enable him to maintain an action upon the contract. Such evidence was inadmissible as contradictory to the statement that the party who executed the contract was the owner of the vessel; but the evidence was in-

⁸ *Huntington v. Knox*, 7 Cush. (Mass.) 371.

⁹ *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 350. Cf. *St. Louis, K. C. & N. Ry. Co. v. Thacher*, 18 Kan. 564; *Talcott v. Railroad Co.*, 159 N. Y. 461, 54 N. E. 1.

¹⁰ *Humble v. Hunter*, 12 Q. B. 310; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. See, also, *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9.

¹¹ *Humble v. Hunter* 12 Q. B. 310. Ante, p. 234.

admissible upon the broader ground that by the terms of the contract the defendant had expressed his intention to give credit only to the person describing himself as owner. "You have a right," said Lord Denman, "to the benefit you contemplate from the character, credit, and substance of the party with whom you contract." The principle is the same when the contract is oral, as where upon a contract of sale the person with whom the buyer deals represents himself to be owner, and denies that another person, with whom the buyer expresses unwillingness to deal, but who is in truth owner and principal, is such.¹³ On the other hand, where the real principal contracts as ostensible agent of an unnamed principal, it has been held that he can sue upon the contract, since, the supposed principal being unnamed, the other party cannot have contracted in reliance upon him personally.¹⁴

Where the nature of the contract is such that the personality of the ostensible principal is or may be of importance, as where his character, skill, or solvency is an essential element of the performance contemplated, it is, of course, clear that the law cannot confer upon the undisclosed principal the right to perform.¹⁴ Yet, even in such case, if the contract is not by its terms made solely with the ostensible principal to the exclusion of any other principal, and if the facts surrounding the making of the contract are not such as to show an intention to deal with the ostensible principal exclusively, after the contract has been performed according to its terms, the undisclosed principal may maintain an action upon it to recover the price or otherwise to enforce performance of the other party's part of the contract.¹⁵

¹³ *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93.

¹⁴ *Schmaltz v. Avery*, 16 Q. B. 655; post, p. 392.

¹⁴ *Kelly v. Thuey*, 102 Mo. 522, 15 S. W. 62. But see *Id.*, 143 Mo. 422, 45 S. W. 301; post, p. 391.

¹⁵ *Grojan v. White*, 2 Stark. 443; *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. 1054; *Warder v. White*, 14 Ill. App. 50. See, also, *Wiehle v. Safford*, 27 Misc. Rep. 562, 58 N. Y. Supp. 298.

Contract under Seal.

As has been stated,¹⁶ if the contract is under seal, an undisclosed principal, not being a party to it, cannot maintain an action thereon in his own name.¹⁷

Negotiable Instrument.

As already explained, no one who is not named in or described as a party to a negotiable instrument can sue upon it.¹⁸ Hence if the instrument is payable to order, and has not been indorsed in blank, only the original payee or the person to whom it has been specially indorsed can maintain an action upon it.¹⁹ And if a negotiable bill or note is made to one who is in fact an agent as payee, or is indorsed to him, an undisclosed principal cannot sue.²⁰ An apparent exception to the rule requiring the party to be named or described exists where the payee or indorsee is intended to be a bank, or, according to some decisions, another corporation, which is described by the name and title of its cashier, or managing officer, as "A. B., Cashier," or "A. B., President," such designation being deemed equivalent to the designation of the bank or corporation. In such case the bank or corporation may sue.²¹

¹⁶ Ante, p. 243.

¹⁷ *Schoch v. Anthony*, 1 M. & S. 573; *Berkeley v. Hardy*, 8 D. & R. 102; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Schaefer v. Henkel*, 75 N. Y. 373; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550; *Smith v. Pierce*, 45 App. Div. 628, 60 N. Y. Supp. 1011 (even though seal not essential).

¹⁸ Ante, p. 244.

¹⁹ *Norton, Bills & N.* (3d Ed.) 212; *Daniels, Neg. Instr.* § 692.

²⁰ *Grist v. Backhouse*, 20 N. C. 496; *United States Bank v. Lyman*, 20 Vt. 666, Fed. Cas. No. 924; *Fuller v. Hooper*, 3 Gray (Mass.) 341. Otherwise if note is not negotiable. *National Life Ins. Co. v. Allen*, 116 Mass. 398.

²¹ *Baldwin v. Bank*, 1 Wall. (U. S.) 234, 17 L. Ed. 534; *First Nat. Bank v. Hall*, 44 N. Y. 395, 4 Am. Rep. 698; *Commercial Bank v. French*, 21 Pick. (Mass.) 480, 32 Am. Dec. 280.

How far Principal Subject to Defenses against Agent.

It is obvious that if an undisclosed principal can enforce his rights upon a contract made by his agent, acting ostensibly as principal, without regard to the defenses which might be available to the other party, were the action brought by the person with whom he believed himself to be dealing as principal, grave injustice would result. If, for example, the buyer has paid the factor of the seller while still believing him to be the principal, or if at the time he entered into the contract the factor was his debtor, it would be contrary to common sense and justice to allow the undisclosed principal in the one case to enforce a second payment from the buyer, and in the other to deprive him of the right to set off against the price of the goods the debt which he may have rightfully intended to set off when he made the contract. It may, therefore, be laid down as a general rule that in an action by the undisclosed principal the other party to the contract is entitled to all equities and defenses which existed in his favor against the agent at the time when the existence of the agency was first disclosed. The most frequent application of this rule has been in cases of sales by factors or other agents intrusted with the possession of the goods, where the buyer has been entitled to set off a debt due from the agent, when sued by the principal for the price.²²

"Where a factor," said Lord Mansfield, "dealing for a principal, but concealing that principal, delivers goods in his name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though¹, the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor

²² *Rabone v. Williams* (1785) 7 T. R. 360. note a; *George v. Clagett*, 7 T. R. 359; *Carr v. Hinchcliffe*, 7 D. & R. 42; *Ex parte Dixon*, 4 Ch. D. 133; *Hogan v. Shorb*, 24 Wend. (U. S.) 458; *Pollacek v. Scholl*, 51 App. Div. 319, 64 N. Y. Supp. 979; *Frame v. Coal Co.*, 97 Pa. 309; *Gardner v. Allen*, 6 Ala. 187, 41 Am. Dec. 45. See, also, *Wiser v. Mining Co.*, 94 Ill. App. 471.

in answer to the demand of the principal. This has been long settled."²² The set-off need not exist at the time of sale; it is sufficient if it arise before notice of the agency.²⁴ If it arises after notice, it cannot be asserted.²⁵ So payment to the factor or other agent before notice of the existence of an undisclosed principal discharges the buyer from further liability,²⁶ but not payment after notice.²⁷ Notice may be communicated directly by the principal's assertion of his demand.²⁸ It may, however, be communicated at the time the contract is made by circumstances affecting the other party with notice.²⁹ Where the other party knows that he is dealing with an agent, although he does not know who the principal is, he is not protected.³⁰ Ordinarily, indeed,

²² *Rabone v. Williams* [1785] 7 T. R. 360, note a.

²⁴ *Baxter v. Sherman*, 73 Minn. 434, 438, 76 N. W. 211, 72 Am. St. Rep. 631.

²⁵ *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Cooke v. Eshelby*, 12 App. Cas. 271; *Mildred v. Maspons*, 8 App. Cas. 874; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631.

²⁶ *Coates v. Lewis*, 1 Camp. 444; *Ramazotti v. Bowring*, 7 C. B. (N. S.) 851 (receiving goods in payment of debt); *Dubois v. Perkins*, 21 Or. 189, 27 Pac. 1044.

²⁷ *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727; *Henderson, Hull & Co. v. McNally*, 3 App. Div. 134, 62 N. Y. Supp. 582; *Rice & Bullen Malting Co. v. Bank*, 185 Ill. 422, 56 N. E. 1063.

²⁸ *Henderson, Hull & Co. v. McNally*, 48 App. Div. 134, 62 N. Y. Supp. 582.

²⁹ *Mildred v. Maspons*, 8 App. Cas. 874; *Wright v. Cabot*, 89 N. Y. 570.

³⁰ *Fish v. Kempton*, 7 C. B. 687; *Semenza v. Brinsley*, 18 C. B. (N. S.) 467; *Dresser v. Norwood*, 17 C. B. (N. S.) 466 (buyer bound by knowledge on part of his broker that factor sold on behalf of principal); *Traub v. Milliken*, 57 Me. 67, 2 Am. Rep. 14; *Rosser v. Darden*, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152.

Where a citizen of Massachusetts sold goods in that state to another citizen, but disclosed that the goods belonged to plaintiff, a citizen of Maine, without disclosing his name, a subsequent discharge in bankruptcy of the buyer under the insolvent laws of Massachusetts was not a bar to an action for the price. *Ilsey v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

it is sufficient to protect the other party that he had not knowledge of the existence of an undisclosed principal, and mere means of knowledge is not enough;⁸¹ but, if circumstances are brought to his knowledge which render the character of the supposed principal equivocal, he is put upon inquiry to ascertain in what character the other acts, and if he makes no inquiry is charged with notice of the agency.⁸² Thus, where a cotton broker, who was intrusted by his principal with the possession of the goods, sold them in his own name without disclosing the existence of the principal, but the buyer knew that he sometimes sold in his own name though acting as broker, and sometimes sold goods of his own, and the buyer in this case had no particular belief either way, it was held that he was not entitled in an action by the principal for the price to set off a debt due from the broker.⁸³

The right to set off a debt due from the agent is not confined to sales by factors and other agents intrusted with possession, but extends to other contracts where the agent is authorized to receive money for his principal. Thus, where the plaintiffs employed a merchant firm to collect general average contributions under an insurance policy, and the firm employed the defendants as brokers, who collected in the belief that they were employed by the firm as principals, and the firm became bankrupt, it was held in an action for the contributions as money had and received to the plaintiffs' use that the defendants were entitled to set off a debt due from the firm.⁸⁴

It is said that the right of the buyer who has dealt with

⁸¹ *Borries v. Imperial Ottoman Bank*, L. R. 9 O. P. 38; *Pratt v. Collins*, 20 Hun (N. Y.) 126.

⁸² *Cooke v. Eshelby*, 12 App. Cas. 271; *Baxter v. Sherman*, 73 Minn. 436, 76 N. W. 211, 72 Am. St. Rep. 631; *Miller v. Lea*, 35 Md. 396, 406, 6 Am. Dec. 417; *Mull v. Ingalls*, 62 N. Y. Supp. 830. Cf. *Scaling v. Knolling*, 94 Ill. App. 443.

⁸³ *Cooke v. Eshelby*, 12 App. Cas. 271.

⁸⁴ *Montague v. Forwood* [1893] 2 Q. B. 351.

the factor or other agent as principal to set off a debt due from the agent rests upon estoppel, and that to establish such an estoppel the party asserting it must show that he was led by the conduct of the principal to believe, and did believe, that the ostensible principal was such.⁵⁵ Clearly, if the principal has expressly or by implication, as in the case of a factor employed to sell, authorized his agent to contract in his own name, the principal would be estopped from asserting rights under the contract inconsistent with the representation which he has authorized to be made. Yet a purchaser from a factor without notice that he is not the principal has the right to set off a debt due from the factor, notwithstanding that in selling in his own name the factor acts in contravention of express directions.⁵⁶ It would seem, therefore, that the right of set-off in such a case may well follow as a result of the identification of principal and agent which rests upon the doctrine of agency. On the other hand, if the agent is one who, like a broker, is not intrusted with possession, or the indicia of ownership, and has not power to contract in his own name, or to receive payment, no right to set off against the price a debt due from the agent or to deduct the amount of a payment made to the agent can arise. If the principal afterwards delivers possession of the goods to the agent, indeed, and he in turn delivers them to the buyer, who receives them without notice of the agency, the buyer

⁵⁵ *Cooke v. Eshelby*, 12 App. Cas. 271; *Baring v. Corrie*, 2 B. & Ald. 137; *Montague v. Forwood* [1893] 2 Q. B. 351; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631.

Of course, if the principal stands by and allows a third person innocently to treat with his agent as principal, he cannot afterwards sue him in his own name. *Ferrand v. Bishoffsheim*, 4 C. B. (N. S.) 710. See, also, *Stebbins v. Walker*, 46 Mich. 5, 18 N. W. 521.

⁵⁶ *Ex parte Dixon*, 4 Ch. D. 133.

"Now, the rule of law is that the extent of an agent's authority, as between himself and third parties, is to be measured by the extent of his usual employment. That being so, the very fact of intrusting your goods to a man as factor, with a right to sell them, is *prima facie* authority to sell in your name." Per Brett, J. A.

would be entitled to a set-off, and the principal would be bound by a payment to the agent, in the same manner as if the agent had been intrusted with possession at the time of the contract of sale.²⁷ But if the seller delivers the goods directly to the buyer, without intrusting their possession to the agent, or in any manner clothing him with authority to receive payment, and the buyer chooses to accept the delivery, the seller would not be bound by a payment to or settlement with the agent, whether made before or after the delivery,²⁸ nor could the buyer set off a debt due from the agent.²⁹ It does not follow, of course, that in such a case the buyer would be obliged to accept the goods, for he would clearly be entitled to refuse the substituted perform-

²⁷ *Belfield v. Supply Co.*, 189 Pa. 189, 42 Atl. 131, 69 Am. St. Rep. 799.

²⁸ *Crosby v. Hill*, 39 Ohio St. 100. In that case plaintiffs' broker, who was not intrusted with possession, contracted in his own name to sell goods to defendant, who had no knowledge that the broker was not the real owner, but dealt with him as such. The broker notified plaintiffs that he had sold for them, and directed them where to ship to the buyer; and they, without knowledge that the broker had contracted in his own name, and without any conduct clothing him with authority to receive payment, or with possession, actual or constructive, delivered to defendant. Held, that payment by defendant to the broker, though before notice of plaintiffs' rights, was not a bar to plaintiffs' right to recover. "Defendant had the means of knowledge at his command," said the court, "and the fact that Roth [the broker] had not possession of the property he was selling was sufficient to require of defendant that, before payment, he should ascertain to whom payment was due." See, also, *Bertoli v. Smith*, 69 Vt. 425, 38 Atl. 76.

²⁹ *Bernshouse v. Abbott*, 45 N. J. Law, 531, 46 Am. Rep. 789. See, also, *Baring v. Corrie*, 2 B. & Ald. 137; *Bliss v. Bliss*, 7 Bosw. 339.

A buyer who had bought goods from one not in possession, with whom he dealt as owner, and who was indebted to him on an account in part settlement of which the goods were sold, could not, when informed before delivery that the goods were the property of an undisclosed principal, set off the amount due from the agent in an action by the principal for the value of the goods. *McLachlin v. Brett*, 105 N. Y. 391, 12 N. E. 17.

ance if he would thereby be deprived of his set-off or defense of payment.⁴⁰ In other words, although if the buyer elected to accept the goods the principal could maintain an action for goods sold and delivered without deduction by reason of such set-off or payment, his right to perform and maintain an action for nonacceptance would be subject to such defense.

QUASI CONTRACT.

72. Where money is paid by an agent to a third person under a mistake of fact, or under such other circumstances that in equity and good conscience he ought not to retain it, the principal may recover it in an action for money had and received.

As a rule, where money is paid by the agent to a third person under such circumstances that it would be unconscionable for him to retain it, the principal may recover it in an action for money had and received.¹ The action is not based upon contract, but upon the ground that the money equitably belongs to the plaintiff, and the obligation is quasi

⁴⁰ *Belfield v. Supply Co.*, 189 Pa. 189, 42 Atl. 131, 69 Am. St. Rep. 799.

"When the lumber came, and the vendee saw that the vendor, on a contract made with him as owner, was seeking to perform as agent, and instead of fulfilling his own obligation was substituting performance by another, such vendee could refuse the substituted performance in any case where his rights or interest would be injuriously affected by the change. * * * The vendees undoubtedly had a right to refuse to come under obligations to the new creditor. * * * But being at liberty to refuse, and to demand performance by Hall & Co. [the vendors], under the existing circumstances and relations, in strict accordance with their contract, they were also at liberty to accept the lumber, with the necessary consequence that the whole purchase price should become due to the real and disclosed owner, and none of it to Hall & Co., except as agents for that owner." Per Finch, J., in *McLachlin v. Brett*, 105 N. Y. 391, 12 N. E. 17. See, also, *Boulton v. Jones*, 2 H. & N. 564, per Bramwell, B.

§ 72. ¹ *Clarke v. Shee*, Cowp. 197.

contractual. Upon this principle, money may be recovered when the agent has paid it under a mistake of fact,² or it has been illegally exacted from him,³ or, where gaming is unlawful, when he has gambled it away or paid it upon a wager.⁴

TORTS—PROPERTY WRONGFULLY DISPOSED OF.

73. Subject to the exceptions stated in sections 74-76, when an agent disposes of the property of his principal to a third person, and in so doing acts beyond the scope of the authority which as against such person he is deemed to have, the principal may maintain an action against such person for the recovery of the property or for conversion.

74. MONEY AND SECURITIES. When an agent pays money or negotiates a negotiable instrument which is transferable by delivery to a bona fide purchaser for value, the purchaser acquires a good title, notwithstanding the agent's want of authority.

75. ESTOPPEL. When the owner of property has represented or permitted it to be represented that another person is owner, or is authorized to dispose of it, the owner is estopped, as against a bona fide purchaser for value, to deny such ownership or authority.

76. FACTORS' ACTS. By statute in some jurisdictions a purchaser or pledgee from a factor or other agent intrusted with the possession of goods or the documents of title may, under certain circumstances, acquire good title, although the agent was not authorized so to dispose of the goods.

In General.

Since the possession of the agent is the possession of the principal, the latter may, of course, maintain an action for any act of trespass committed by a third person upon

² *United States v. Bartlett*, 2 Ware (U. S.) 17, Fed. Cas. No. 14,532.

³ *Stevenson v. Mortimer*, Cowp. 805. See *Demarest v. Barbadoes* Tp., 40 N. J. Law, 604.

⁴ *Mason v. Waite*, 17 Mass. 560; *Burnham v. Fisher*, 25 Vt. 514; *Thompson v. Hynds*, 15 Vt. 389, 49 Pac. 293.

his property in the agent's hands,¹ and, if the property is wrongfully converted, may maintain an action for its recovery² or for conversion.³

As a rule, no person can transfer to another a better title than he himself possesses. A person, therefore, however innocent, who buys a thing from one not the owner, or receives it in deposit by way of security, obtains, in general, no property in it whatsoever. It makes no difference that the person who assumes to sell or otherwise dispose of the thing is an agent, unless he has authority, real or apparent, to do so. If the disposition of the thing, whether by way of sale,⁴ pledge,⁵ barter,⁶ or otherwise, is not one which, as against the other party, the agent is to be deemed authorized to make, the owner may maintain an action for recovery of possession or for conversion. To the general rule, that no person can transfer a better title than he possesses, however, there are some exceptions, several of which are here in point.

Money and Negotiable Instruments.

When any person in the possession of money, although he may have stolen it, pays it for value to a person who has no notice of any defect in his title, the latter acquires a perfect title to it. And by the law merchant bills of exchange, promissory notes, and other negotiable securities, if payable to bearer or indorsed in blank, and hence transferable by

§§ 73-76. ¹ *Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

² *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502.

³ *Waldo v. Peck*, 7 Vt. 434.

⁴ *Biggs v. Evans* [1894] 1 Q. B. 88; *Levi v. Booth*, 58 Md. 308, 42 Am. Rep. 332; *Manning v. Keenan*, 73 N. Y. 45; *Thompson v. Barnum*, 49 Iowa, 392; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 50 N. W. 663, 48 Am. St. Rep. 400.

⁵ *Fletcher v. Heath*, 7 B. & C. 517; *Boyes v. Coles*, 6 M. & S. 14; *Thurber v. Bank (C. C.)* 52 Fed. 513.

⁶ *Guerreiro v. Pells*, 3 B. & A. 618; *Taylor & Farley Organ Co. v. Starkey*, 59 N. H. 142.

delivery, stand upon the same footing, provided they are negotiated to a purchaser for value before maturity.⁷ Consequently, when an agent without authority pays money or negotiates such securities belonging to his principal to one who has no notice of the agency, the other conditions being fulfilled, the principal is without remedy against him.⁸

Principal Estopped.

As has been explained, authority to sell is not to be inferred from possession; but the owner may be estopped as against a purchaser to deny the ownership of one whom he has intrusted with possession, if he has invested him with the indicia, or other documentary evidence, of title,⁹ and may be estopped, if the other elements of estoppel exist, to deny that a person intrusted with possession was his agent and authorized to sell.¹⁰

Factors' Acts.

At common law, when the principal intrusts goods to a factor for sale, the factor may sell in his own name, and unless the buyer has notice of some limitation upon the authority, the agent has, as against him, the customary powers of a factor, such as fixing the price and selling on credit. On the other hand, although the goods are intrusted to the possession of a factor, unless they are intrusted for sale the factor has no power to sell them, and one who buys in reliance upon his apparent ownership is not protected.¹¹ Moreover, at common law, a factor intrusted with possession of the goods and authorized to sell has no power to pledge.¹² To afford protection to persons dealing with factors and other agents intrusted with the possession of goods or of

⁷ Norton, B. & N. (3d Ed.) 110, 204.

⁸ Goodwin v. Roberts, 1 App. Cas. 476; Rumbull v. Metropolitan Bank, 2 Q. B. D. 194; London Joint S. Bank v. Simmons [1892] A. C. 201.

⁹ Ante, p. 204.

¹¹ Ante, p. 204.

¹⁰ Ante, pp. 34, 183.

¹² Ante, p. 223.

the documentary evidence of title, so-called factors' acts have been enacted in many jurisdictions.

English Factors' Acts.

The early English factors' act of 1825 (6 Geo. IV, c. 94)¹³ has been to a great extent the model of the various enactments on the same subject in the United States. The second section provided that any person "intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, shall be deemed and taken to be the true owner * * * of the goods * * * mentioned in said several documents * * * so far as to give validity to any contract" made by him with any other person for the sale or disposition of the goods, or for the deposit or pledge thereof as security for advances made upon the faith of such several documents, or either of them; provided such persons had not notice that the person so intrusted was not the actual and bona fide owner of the goods. This made an important alteration in the law by giving to the possessor of bills of lading or other documents of title power of selling or pledging the goods beyond any which either by the common law or by any other section of the act the possession of the goods themselves conferred.¹⁴ It is to be observed that it was only persons who dealt with the person in possession upon the faith of the documents, in the belief that he was owner, who were protected.¹⁵ The fourth section provided that purchasers from any agent "intrusted with any goods, wares, and merchandise," or to whom the same might be consigned, should be protected in their purchases notwithstanding notice that the seller was agent, provided that the purchase and payment were made in the usual course of business, and the buyer had not notice of

¹³ An earlier act was passed in 1823 (6 Geo. IV, c. 83).

¹⁴ Evans, Ag. 416.

¹⁵ Phillips v. Huth, 6 M. & W. 572; Hatfield v. Phillips, 9 M. & W. 647.

the absence of authority of the agent. By 5 & 6 Vict. c. 39 (1842), the act was so amended as to give the same effect to the possession of the goods as to that of the documents of title, and it was provided that any agent intrusted with the possession of either was to be deemed the true owner so as to give validity to any bona fide contract by way of pledge, with the important change that such contract should be binding upon the owner notwithstanding that the pledgee had notice that the person with whom the agreement was made was only an agent. These acts applied solely to persons intrusted as factors or commission merchants, and not to persons to whose employment authority to sell is not ordinarily incident; for example, a wharfinger.¹⁶ They were limited in their scope to mercantile transactions, and did not embrace sales of furniture or of goods in possession of a tenant or bailee for hire.¹⁷

It might be supposed that the effect of these enactments would be such that, if the owner of goods intrusted their possession or the documents of title to a person who from the nature of his employment might be taken *prima facie* to have the right to sell, a pledge by such a person to one who was without notice of the absence of authority would bind the true owner. Nevertheless, under 5 & 6 Vict. c. 39, it was held that the agent must be actually intrusted at the time of the pledge, and that if the authority had been withdrawn, although the pledgee was ignorant thereof and acted in good faith, and the agent remained in possession, the pledgee was not protected.¹⁸ To constitute a person "an agent intrusted with the possession," he must have been intrusted in the character of such agent; that is, for the pur-

¹⁶ *Monk v. Whittenbury*, 2 B. & Ad. 484; *Wood v. Rowcliffe*, 6 Hare, 183; *Lamb v. Attenborough*, 1 B. & S. 831; *Jaullery v. Britten*, 4 Bing. N. C. 242; *Hellings v. Russell*, 33 L. T. (N. S.) 380.

¹⁷ *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomatt*, 1 C. B. 672.

¹⁸ *Fuentes v. Montis*, L. R. 4 C. P. 93. See, also, *Sheppard v. Union Bank*, 7 H. & N. 661.

pose of sale.¹⁹ The acts did not cover the case of a seller left in possession,²⁰ or of a buyer left in possession, so as to defeat the rights of an unpaid seller.²¹ The effect of these decisions was partly annulled in 1877 by 40 & 41 Vict. c. 39, which provided that a secret revocation of agency should not be operative, and which extended the scope of the acts to buyers and sellers left in possession, and in some other respects. In 1889 was passed an act to amend and consolidate the factors' acts (52 & 53 Vict. c. 45), which embodies the changes made by the act of 1877.²²

American Factors' Acts.

Factors' acts have been passed in many states.²³ Owing to their varying provisions, only that of New York, which has been followed in some other states, will be considered. This act, which will be found in the Appendix, was passed in 1830, and was, with some modifications, based on 6 Geo. IV, c. 94.²⁴ It provides in section 3 that "every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouse keeper's receipt for

¹⁹ *Cole v. Northwestern Bank*, L. R. 9 C. P. 470, affirmed L. R. 10 C. P. 354; *Johnson v. Credit Lyonnais Co.*, 2 C. P. D. 224, affirmed 3 C. P. D. 32; *Biggs v. Evans* [1894] 1 Q. B. 88.

²⁰ *Johnson v. Credit Lyonnais Co.*, 2 C. P. D. 224.

²¹ *Jenkyns v. Usborne*, 7 M. & G. 678; *McEwan v. Smith*, 2 H. L. Cas. 309.

²² Appendix, p. 479.

²³ Kentucky, Laws 1880, May 5, p. 200, c. 1541; Maine, Rev. St. c. 31; Maryland, Pub. Gen. Laws 1888, art. 2; Massachusetts, Rev. Laws 1902, c. 68 (construing the Massachusetts act, *Nickerson v. Darrow*, 5 Allen [Mass.] 419; *Stollenwerck v. Thacher*, 115 Mass. 224; *Thacher v. Moors*, 134 Mass. 156; *Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279; *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503); New York, Rev. St. (9th Ed.) p. 2006; Ohio, Rev. St. 1890, §§ 3214-3220; Pennsylvania, *Pepper & Lewis' Dig.* pp. 2027-2029; Rhode Island, Gen. Laws 1896, c. 158; Wisconsin, Rev. St. 1898, §§ 3345, 3346.

²⁴ See *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Id.*, 3 Denio (N. Y.) 472; *Aller v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573.

the delivery of any such²⁵ merchandise, and every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent, with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing, given by such other person upon the faith thereof." The words "upon the faith thereof" are to be referred to the words "shall be deemed to be the true owner thereof"; in other words, the statute does not afford protection to one who knows that he is not dealing with the true owner.²⁶ "The object of the statute was to protect innocent persons who deal in reliance upon apparent ownership, resting upon possession either of the merchandise itself or documentary evidence of ownership."²⁷ The act thus differs materially from the later English acts, in which the protection extends to those dealing with the agent, notwithstanding knowledge that he is such, provided they are without notice that he is exceeding his authority.²⁸

The protection of the act is extended to persons dealing with (1) a factor or other agent intrusted with the bill of

²⁵ Referring to section 1: "Every person in whose name any merchandise shall be shipped," i. e., any merchandise shipped in the name of the factor or agent. *Cartwright v. Willmerding*, 24 N. Y. 521, 527; *Zachrisson v. Ahman*, 2 Sandf. 68; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *First Nat. Bank v. Shaw*, 61 N. Y. 283.

²⁶ *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Covell v. Hill*, 6 N. Y. 374; *Howland v. Woodruff*, 60 N. Y. 73.

This construction was disapproved under a similar act in Wisconsin. *Price v. Insurance Co.*, 43 Wis. 267. Cf. *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573.

²⁷ *Per Vann, J.*, in *New York Security & Trust Co. v. Lipman*, 157 N. Y. 551, 52 N. E. 595.

²⁸ *Navulshaw v. Brownrigg*, 1 Sim. N. S. 573; *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113. See *Factors' Act 1889*, § 2.

lading or other document, or (2) a factor or other agent who is intrusted with the possession of the merchandise "for the purpose of sale or as security for any advances to be made or obtained thereon." Under the first branch the agent must have the documentary evidence of title in his name.²⁹ This must be a bill of lading, custom house permit, or warehouse keeper's receipt;³⁰ the act thus differing from the later English acts, which have included any document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize the possessor to transfer or receive goods thereby represented.³¹ Under the second branch the intrusting must be for the purpose of sale or obtaining advances,³² here again differing from the present English act.³³ The possession

²⁹ *First Nat. Bank v. Shaw*, 61 N. Y. 283. It seems that the document must be intrusted "for the purpose of sale," etc. *Cartwright v. Wilmerding*, 24 N. Y. 521, 528. Cf. *Price v. Insurance Co.*, 43 Wis. 267.

³⁰ *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843. Cf. *Cartwright v. Wilmerding*, 24 N. Y. 521.

³¹ *Vickers v. Hertz*, L. R. 2 H. L. Sc. 113. See *Factors' Act* 1889, § 1.

³² *Moors v. Kldder*, 106 N. Y. 82, 12 N. E. 818.

³³ See *Factors' Act* 1889, § 2. By section 1 it is provided that "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods. By section 2 it is provided that, when a mercantile agent is with the consent of the owner in possession, any disposition made by him when acting within the ordinary course of business of a mercantile agent shall, subject to the provisions of the act, be valid, etc. An agent employed to hawk about and sell goods on commission is not a "mercantile agent." *Hastings v. Pearson* [1892] 1 Q. B. 62.

But one employed on a salary to go about and sell goods put into his manual possession is a person "intrusted with merchandise and having authority to sell or consign the same," within Mass. Pub. St. c. 71, § 3, protecting one who receives merchandise from such person, and advances money thereon in good faith, believing him to be the owner; the statute not being confined to mercantile agents. *Cairns v. Page*, 165 Mass. 552, 43 N. E. 503.

must be actual, and not merely constructive.⁸⁴ In either case, the possession must be "intrusted." The agent must be consciously and voluntarily intrusted, and the act has no application to a case where the documents or the goods are taken by trespass or theft, and thus the possession is from the beginning wrongful.⁸⁵ When the merchandise is taken in deposit as security for an antecedent debt, no greater right is acquired than was possessed and might have been enforced by the agent.⁸⁶ The owner may demand and receive any merchandise so deposited on repayment of the money advanced, and may recover any balance in the hands of the person with whom the merchandise was deposited as the produce of its sale, after satisfying the amount due him by reason of the deposit.⁸⁷

SAME—FOLLOWING TRUST FUNDS.

77. When an agent misapplies money intrusted to him, or wrongfully converts the property of his principal into some other form, the principal is entitled, as against the agent or any person claiming under him except a bona fide purchaser, to the proceeds of such money or property, provided that they can be identified as such; and, if the agent has mixed the money or property with his own, the principal is entitled, as against the agent or such other person, to a charge upon the mixed fund or mass, or upon the proceeds of the same, provided the original money or property, or the proceeds thereof, can be identified as entering into the fund or property sought to be charged.

⁸⁴ *Boninto v. Mosquera*, 2 Bosw. (N. Y.) 401; *Howland v. Woodruff*, 60 N. Y. 73.

⁸⁵ *Kinsey v. Leggett*, 71 N. Y. 387; *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 804, 16 Am. St. Rep. 843; *Sage v. Lumber Co.*, 4 App. Div. 290, 39 N. Y. Supp. 449, affirmed 158 N. Y. 672, 52 N. E. 1126. See, also, *First Nat. Bank v. Shaw*, 61 N. Y. 283; *Collins v. Balli*, 20 Hun, 246, affirmed 85 N. Y. 637.

⁸⁶ Section 4. Cf. 52 & 53 Vict. c. 45, § 4.

⁸⁷ Section 5. Cf. 52 & 53 Vict. c. 45, §§ 5, 12.

When an agent misapplies the property of his principal, the latter may recover it, in whosoever hands it may be, provided he can identify it, unless the circumstances create an estoppel, or unless the property be money or a negotiable instrument transferable by delivery, which has come into the hands of a bona fide purchaser. The principal is not confined, however, to a recovery of the specific thing in which he has property. If the agent wrongfully converts the thing, whether it be money or other property, into some other form, as by procuring something in place of it by sale, purchase, or exchange, the principal's right attaches in equity to the proceeds in the hands of the agent, no matter how many transmutations of form the property may pass through,¹ and the principal may reclaim the proceeds from the agent or may follow and reclaim them, into whosoever hands they may come, so long as the original thing in its substituted form can be identified, until his right of recovery is cut off by the intervention of a bona fide purchaser.² The basis of the doctrine is the right of property. It proceeds upon the theory that in equity the product or avails of that which is the principal's property belong to him and have imputed to them the nature of the original property. Whether the product or avails are in the hands of the agent or have come into the hands of a third person who is not a bona fide purchaser, equity converts the person in whose hands they are into a trustee.³

It follows that the agent's trustee in bankruptcy in such a case has no right, as against the principal, to any such

§ 77. ¹ *Taylor v. Plumer*, 3 M. & S. 562; *Ex parte Cooke, re Strachan*, 4 Ch. D. 123; *Third Nat. Bank v. Gas Co.*, 36 Minn. 75, 30 N. W. 440.

² *Re Hallett's Estate*, 13 Ch. D. 696; *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Importers' & Traders' Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Roca v. Byrne*, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599.

³ *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20; *Eaton*, Eq. 411, 436.

property in the agent's hands;⁴ that the rights of an attaching creditor are inferior to those of the principal;⁵ that the principal may reclaim such property from a mere volunteer or from a purchaser with notice;⁶ and that, when funds to which the principal's equitable right has attached have been deposited by him in the bank, the bank can assert no lien or claim thereon, even with the agent's consent, if it had notice of the principal's beneficial ownership.⁷

The chief difficulty which arises in such cases is in establishing the identity of some particular fund with the property or fund which was originally subject to the trust, particularly when it has been mixed with other moneys of the trustee. Formerly it was held that if the fund had become confused with other moneys, so as to be indistinguishable therefrom, the equity was lost.⁸ It is established, however, that confusion does not do away with the equity entirely, but converts it into a charge upon the entire fund, which is superior to the claims of the general creditors of the trustee.⁹ This doctrine has even been so far extended by some courts as to hold that it is enough if the particular property or fund can be traced into the estate of the trustee so as to augment it, without tracing the trust fund into any specific fund or property, and that in such case the beneficiary is entitled to a charge or lien upon the general assets of the

⁴ *Taylor v. Plumer*, 3 M. & S. 562; *Ex parte Cooke*, 4 Ch. D. 123; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367.

⁵ *Merrill v. Bank*, 19 Pick. (Mass.) 32; *Farmers' & Mechanics' Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215.

⁶ *Riehl v. Association*, 104 Ind. 70, 3 N. E. 636.

⁷ *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Baker v. Bank*, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150.

⁸ *Taylor v. Plumer*, 3 M. & S. 562.

⁹ *Broadbent v. Barlow*, 8 De Gex. F. & J. 570; *Frith v. Cartland*, 34 L. J. Ch. 301; *Re Hallett's Estate*, 13 Ch. D. 696; *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Frelinghuysen v. Nugent* (C. C.) 36 Fed. 229, 230; *Van Alen v. Bank*, 52 N. Y. 1.

estate superior to the rights of the general creditors;¹⁰ but this now finds little support. If the principal is unable to trace the trust property into any specific property or fund, or at least to make it appear that the proceeds are in fact included in the estate remaining for distribution, the trust creditor is not entitled to preference.¹¹

FRAUD AND DECEIT.

78. When a third person, in dealing with an agent, is guilty of fraud to the injury of the principal, he is liable to the principal for the loss thereby incurred.

SAME—COLLUSION WITH AGENT.

79. When a third person colludes with the agent in defrauding the principal, they are jointly and severally liable to the principal for the loss thereby incurred.

Deceit and Fraud.

A third person who is guilty of fraud to the injury of the principal is, of course, liable to him no less than if he had acted in person. Thus, if a third person, in contracting with the agent, makes a false representation, which would entitle the principal, had he dealt in person, to maintain an action

¹⁰ *McLeod v. Evans*, 66 Wis. 409, 28 N. W. 173, 214, 57 Am. Rep. 237 (overruled *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383); *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; *Pundmann v. Schoenich*, 144 Mo. 149, 45 S. W. 1112. See, also, *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442.

¹¹ *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; *Philadelphia Nat. Bank v. Dowd* (C. C.) 38 Fed. 172, 2 L. R. A. 480; *Metropolitan Nat. Bank v. Commission Co.* (C. C.) 77 Fed. 705; *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383 (overruling *McLeod v. Evans*, 66 Wis. 409, 28 N. W. 173, 214, 57 Am. Rep. 237); *Continental Nat. Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20. Cf. *Bishop v. Mahoney*, 70 Minn. 238, 73 N. W. 6.

for deceit, he may maintain such action.¹ So, if a public officer knowingly makes a false record, and a person is injured in a transaction by reason of the fact that his agent charged with the business is deceived by the record, the law will treat the principal as deceived, and hold the officer responsible to him.²

Collusion with Agent.

It has already been explained that a contract made by an agent under the influence of bribery or to the knowledge of the other party, in fraud of the principal, is voidable, at his option.³ In such a case the principal may, at his election, rescind the contract, or he may maintain an action to recover damages against them for the wrong.⁴ Thus, where an agent was induced by bribery to enter into a contract, it was held that the principal was entitled, not merely to recover from the agent the amount of the bribe, but, in an action against the other party, to recover damages for the fraud. "The agent," said Lord Esher, "has been guilty of two distinct and independent frauds; the one in his character of agent, the other by means of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received."⁵ So, where a member of the

§§ 78-79. ¹ Tuckwell v. Lambert, 5 Cush. (Mass.) 23.

² Perkins v. Evans, 61 Iowa, 35, 15 N. W. 584.

³ Ante, p. 229.

⁴ Mayor of Salford v. Lever [1891] 1 Q. B. 168; Glasple v. Keator, 5 C. C. A. 474, 56 Fed. 203; City of Findlay v. Pertz, 13 C. C. A. 559, 66 Fed. 427, 437, 29 I. R. A. 188; City of Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230. See, also, Panama Tel. Co. v. India Rubber Co., L. R. 10 Ch. 515.

⁵ Mayor of Salford v. Lever [1891] 1 Q. B. 168.

water board of a city and a third person combined to purchase, in the name of the latter, land which should afterwards be purchased by the board at an advanced price, and the profits be divided, and the purpose was effected, it was held that both were alike liable for the injury sustained by the city. "The abuse of trust of which the agent is guilty, with his [the other's] knowledge and co-operation," said the court, "is a wrong for which both are liable, as the injury to the principal is the result of their combined action."^{*}

LOSS OF SERVICE CAUSED BY WRONGFUL ACT.

80. When a third person, by his wrongful act inflicted upon a servant, deprives the master of his services, or knowingly entices from the service of the master a servant who is employed under a contract, such person is liable to the master for the loss of service thereby caused.

A master may recover for the actual damage he may suffer by the wrongful act of a third person inflicted upon his servant whereby he is deprived, in whole or in part, of the latter's services.¹ Thus action lies for assault and battery upon a servant,² for false arrest or imprisonment,³ or for negligence impairing his ability to serve.⁴ This doctrine appears to be equally applicable where the relation is that of principal and agent, provided a contract of employment exists, giving the principal a right to the agent's services.

While a contract imposes no liability upon one who is not a party to it, an action to recover damages for malicious

^{*} *City of Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230.

§ 80. ¹ *Jaggard*, Torts, 634.

² *Fluker v. Railroad Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328.

³ *Woodward v. Washburn*, 3 Denio (N. Y.) 369; *St. Johnsbury & L. C. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

⁴ *McCarthy v. Guild*, 12 Metc. (Mass.) 291; *Ames v. Railroad Co.*, 117 Mass. 541, 19 Am. Rep. 426.

interference with contract has become recognized in England⁵ and in some jurisdictions in this country.⁶ When the contract is between master and servant, there is probably no conflict that action lies. Knowingly enticing from the service of his master a servant who is employed under a contract is an actionable wrong, even in jurisdictions which do not extend the doctrine to other contracts.⁷ It seems that the existence of a contract giving the plaintiff a right to the services is necessary.⁸ Whether, if the rule is exceptional in its application to contracts of employment, it extends to all cases where a person is employed to give his personal services under the direction of the employer, there is disagreement. In England it has been held that such an action lies for wrongfully procuring an opera singer to break her contract with the manager of a theater.⁹ In a similar case in Kentucky it was held that the action could not be maintained, because it was not the policy of the law to restrict competition, whether concerning property or personal services, and the only occasion for more stringent regulation of the latter is where some one of the domestic relations exists.¹⁰

⁵ *Lumley v. Gye*, 2 El. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 339; *Temperton v. Russell* [1893] 1 Q. B. 376.

⁶ *Angle v. Railroad Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55. See 1 Jaggard, Torts, 634; Clark, Contr. 511.

⁷ *Walker v. Cronin*, 107 Mass. 555; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Noice v. Brown*, 39 N. J. Law, 569; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, Id. 601; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680.

⁸ *Nicol v. Marlyn*, 2 Esp. 734; *Sykes v. Dixon*, 9 Ad. & El. 693; *Walker v. Cronin*, 107 Mass. 555, 563; *Campbell v. Cooper*, 34 N. H. 49.

But see *Keane v. Boycott*, 2 H. Bl. 511; *Cox v. Munsey*, 6 C. B. (N. S.) 375; *Salter v. Howard*, 43 Ga. 601.

⁹ *Lumley v. Gye*, 2 El. & B. 216 (see remarks of Crompton, J., p. 227).

"It extends to every grade of service." Per Rodman, J., in *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780.

¹⁰ *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171.

PART III.

RIGHTS AND LIABILITIES BETWEEN AGENT AND THIRD PERSON.

CHAPTER XIII.

LIABILITY OF AGENT TO THIRD PERSON (INCLUDING PARTIES TO CONTRACTS).

- 81. Liability on Authorized Contract.
- 82. Nature of Contract.
- 83. Parties to Instrument under Seal.
- 84. Parties to Negotiable Instrument.
- 85. Parol Evidence.
- 86. Parties to Contract not Sealed or Negotiable.
- 87. Written Contract.
- 87a. Parol Evidence.
- 88. Oral Contract.
- 89. Public Agent.
- 90. When Apparent Agent is Real Principal.
- 91. When Agent Acts Without Authority—Implied Warranty of Authority.
- 92. Measure of Damages for Breach of Warranty.
- 93. Liability on Quasi Contract—Money Received in Good Faith.
- 94. Money Obtained Wrongfully.
- 95. Money Received from Principal for Third Person.
- 96. Liability for Torts.
- 97. Nonfeasance.

LIABILITY ON AUTHORIZED CONTRACT.

- 81. When an agent duly makes an authorized contract in the name of his principal, the principal only is liable thereon. When an agent contracts personally, although on behalf of his principal, he is personally liable on the contract. Whether the agent is to be deemed to have contracted personally, or merely as agent, depends upon the nature and terms of the particular contract.

SAME-NATURE OF CONTRACT.

82. The rules to be applied to the construction of the particular contract are determined by its nature, and depend upon whether the contract is—

- (1) A sealed instrument;
- (2) A negotiable instrument;
- (3) An instrument neither sealed nor negotiable; or
- (4) An oral contract.

Whenever the agent acting within the scope of the authority which, as against the other party, he must be deemed to have,¹ contracts in the name of the principal, the principal, and he only, is bound.² And although the contract be unauthorized, if it be made in the name of the principal, and he duly ratifies it, he, and he only, is bound.³ If the contract is made in the name of the principal, but is not within the scope of the agent's authority, and is not ratified, neither principal nor agent is bound by the contract,⁴ although the agent may be liable to the other party upon his so-called warranty of authority.⁵ It may be, however, that the agent in the execution or attempted execution of his authority contracts in such manner as to bind himself. In such case he is personally liable on the contract; and, if the contract was within the scope of his authority, the principal, although undisclosed, is liable also,⁶ but if the contract was not within the scope of the authority only the agent is liable.⁷ In short, in the execution or attempted execution of his authority the agent may so contract as to bind the principal only, or to bind the principal and himself, or to bind himself only, either upon the contract or upon a warranty of authority, or to bind neither. It will be convenient at this point to discuss the effect which the manner of execution has upon the liabilities thereby incurred by the principal as well as by

§§ 81-82. ¹ Ante, p. 180.

⁴ Post, p. 369.

⁶ Ante, p. 231 et seq.

² Ante, p. 181.

⁵ Post, p. 368.

⁷ Post, p. 369.

³ Ante, p. 81.

the agent toward the other party to the contract, and incidentally, to some extent, the reciprocal liability of the other party toward the person so bound. The question whether the agent is to be deemed to contract personally, or merely as agent, depends, as a rule, upon the intention of the parties as disclosed by the terms of the contract. If the contract is in writing the construction is for the court, and if not reduced to writing the intention of the parties is for the jury.

In case of instruments under seal and negotiable instruments, however, technical rules of construction prevail. We shall, therefore, consider the liability of the parties upon these different classes of contracts in the following order: (1) Instruments under seal; (2) negotiable instruments; (3) other written contracts; (4) oral contracts.

PARTIES TO INSTRUMENT UNDER SEAL.

83. To render the principal liable upon a sealed instrument when executed by his agent, he must be described as a party thereto, and it must be executed in his name. When an agent executes in his own name a sealed instrument which by its terms purports to be binding upon himself, he is personally liable thereon, although he is therein described as contracting, and executes the instrument, as agent of a named principal.

EXCEPTION: PUBLIC AGENTS. These rules do not apply to public agents.

No one who is not named in and described as a party to a sealed instrument can be charged or maintain an action upon it. The instrument, if made by an agent, to be binding upon the principal, must be executed in his name.¹ The act must purport to be the act of the principal, and not of

§ 83. 1 Ante, p. 243.

As to the rule where the seal is superfluous, ante, p. 244.

The common-law rule governing execution of sealed instruments by agents is not changed by a statute dispensing with seals. *Jones v. Morris*, 61 Ala. 518. *Contra, Gibbs v. Dickson*, 33 Ark. 107.

the attorney who is authorized to do it.³ The usual and approved form of signature of a deed by attorney is by signing the name of the principal, and adding, "by B., His Attorney." No particular form of words, however, is required to be used, provided the act purport to be done in the name of the principal. It is not even necessary that it appear upon the face of the instrument that it is executed by attorney.⁴ An instrument in terms purporting to be the bond or deed of A., and executed by his agent, who signs "B., for A.," is no less the act of A. than if signed "A., by B., His Attorney," or "A., by B."⁵ On the other hand, an instrument purporting to be the bond or deed of "B., Agent," or of "B., Agent for A.," is not the act of A., but of B., who is himself bound; the addition of the words "Agent" or "Agent for A." being held to be mere *descriptio personæ*.⁶ For example, a deed which recited the power of the attorney, B., by virtue of a vote of the A. Proprietors, authorizing him to execute deeds in their behalf, but which ran in the

³ "It was resolved that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives the authority." *Combes' Case*, 9 Co. 75a.

⁴ *Wilks v. Back*, 2 East, 142, per Lawrence, J.; *Forsyth v. Day*, 41 Me. 382; *Devinney v. Reynolds*, 1 Watts & S. (Pa.) 328; *Berkey v. Judd*, 22 Minn. 287; *Deakin v. Underwood*, 37 Minn. 98, 33 N. W. 818, 5 Am. St. Rep. 827. Contra, *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771, per Fletcher, J. See *Mechem*, Ag. §§ 427-429.

⁵ *Wilks v. Back*, 2 East, 142; *Mussey v. Scott*, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367; *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 178; *Whitehead v. Reddick*, 34 N. C. 95; *Redmond v. Coffin*, 17 N. C. 437.

⁶ *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Fullam v. Inhabitants of West Brookfield*, 9 Allen (Mass.) 1; *Dayton v. Warne*, 43 N. J. Law, 659; *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634. Cf. *Magill v. Hinsdale*, 6 Conn. 464a, 16 Am. Dec. 70.

name of B., concluding, "In testimony that this instrument shall be forever hereafter acknowledged by the said proprietors as their act and deed, and be held good and valid by them, I, the said B., by virtue of the aforesaid vote, do hereunto set my hand and seal," and signed with B.'s name and a seal, was held to be the deed of B., who was liable on the covenants.⁶ Not only must the principal be described as party, but the execution must be in his name. Thus, a deed which ran in the name of "The A. Company, a corporation, by B., Their Treasurer," concluding, "In witness whereof I, the said B., in behalf of said company, and as their treasurer, have hereunto set my hand and seal," signed "B., Treasurer of the A. Company," and acknowledged by "B., Treasurer," to be his free act and deed, was held not to be the deed of the corporation, and to convey no title.⁷

Nevertheless, if the instrument, read as a whole, purports to be the deed of the principal, it will be allowed to take effect as such, notwithstanding irregularities or informalities in the description of the parties, or in the testimonium clause, or in the signature, which are not repugnant to that purport, provided that one part so refers to another part as to supply what is defective in the others.⁸ For example, an indenture of lease which described the second party as "B., President of the A. Company," and throughout which the parties were mentioned as of the first or second part, and the pronoun "he" was everywhere used in referring to the party of the second part, concluding, "In testimony whereof the said parties have hereunto set their hands and seals," but signed "A. Company, [Seal] by B., President," was

⁶ *Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65. See, also, *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126 (an extreme case).

⁷ *Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 609.

⁸ *McDaniels v. Manufacturing Co.*, 22 Vt. 274; *Bradstreet v. Baker*, 14 R. I. 546; *Shanks v. Lancaster*, 5 Grat. (Va.) 110. 50 Am. Dec. 108; *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631; *Butterfield v. Beall*, 3 Ind. 203; *Martin v. Almond*, 25 Mo. 313; *City of Kansas v. Railroad Co.*, 77 Mo. 180.

held to be the lease of the company, against which an action of covenant lay thereon. "The conclusion of a lease, as well as its commencement," said the court, "may be looked to for the description of the parties. The conclusion describes them to be those persons who have set their hands and seals to the instrument, and it is the signature and seal of the A. Company which are set thereto, not that of B." * And, conversely, a contract under seal "between the A. Company, party of the first part, by B., agent, and C. and D., parties of the second part," the stipulations of which purported to be between "the said party of the first part" and "the said parties of the second part," concluding, "In witness whereof the parties have hereunto affixed their hands and seals," and signed "B., Agent [L. S.]," was held to be the contract of the company. Here, had the signature read "B., for A Company," or "B., Agent for A. Company," the execution, taken in connection with what preceded it, must manifestly have been understood as an execution in the name of the company. Had the words "for A. Company" been added to the signature, "those words," said the court, "would express nothing which is not expressed without them by the signature, taken in connection with the testimonium clause and covenant which preceded it. The seal is stated in said clause to be the seal of the principals, and the hand to be their hand, evidently because the agent signed for them." ¹⁰

It does not follow that an instrument made by an agent is binding either upon the principal or upon the agent; for it may be so defective in the manner of its execution as not to be binding upon the principal, and yet not purport to bind the agent. If the agent employs such terms as legally to import an undertaking by the principal only, the contract can bind no one but the principal, but can bind him only provided its execution conforms to the technical requirements; if it

* *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 681.

¹⁰ *Bradstreet v. Baker*, 14 R. I. 546.

fails to conform to the technical requirements, it does not become binding upon the agent merely because he has signed it, since the terms do not import a personal undertaking.¹¹

Same—Public Agents.

A different rule prevails in respect to public agents. Where a contract is entered into or a deed executed in behalf of the government by an authorized public agent, notwithstanding that the agent may have executed it in his own name, it is the contract or deed of the government, who alone is responsible. To be binding upon the agent, his intent to be bound must clearly appear.¹²

PARTIES TO NEGOTIABLE INSTRUMENT.

84. To render the principal liable upon a negotiable instrument when executed by his agent, he must be named as a party thereto, and it must appear therefrom that it was executed for him and on his behalf. When an agent executes a negotiable instrument in his own name, unless he clearly indicates therein that he executes it as agent for and on behalf of the principal, he is personally liable thereon. The mere addition to the name or signature of the agent of words describing him as agent does not exempt him from personal liability, whether the principal is named therein or not.

EXCEPTION 1: PUBLIC AGENTS. These rules do not apply to public agents.

EXCEPTION 2: ACCEPTANCE. Where a bill of exchange is drawn on the principal, and is accepted by the

¹¹ *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 126; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131; *Neufeld v. Beldler*, 37 Ill. App. 34.

Such instruments have frequently been enforced against the principal in equity. *Johnson v. Johnson*, 1 Dana (Ky.) 364; *Love v. Mining Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Gerdes v. Moody*, 41 Cal. 335; *Daughtrey v. Knolle*, 44 Tex. 450.

¹² *Union v. Wolsely*, 1 T. R. 674; *Hodgson v. Dexter*, 1 Oranch (U. S.) 345, 2 L. Ed. 130; *Knicht v. Clark*, 48 N. J. Law, 22, 2 Atl. 780, 57 Am. Rep. 534; post, pp. 354, 367.

agent, unless it be required by statute that the signature of the acceptor appear in the acceptance the principal is deemed to be the acceptor, whether the acceptance is in his name or in that of the agent.

SAME—PAROL EVIDENCE.

85. Where a negotiable instrument is executed by an agent, it must be determined by construction of the instrument whether the principal or the agent is bound thereby, and parol evidence to show a different intention than that thereby disclosed is inadmissible.

EXCEPTION 1: IN GENERAL. In many jurisdictions, but not in all, if upon the face of the instrument there is any indication that the person executing it is agent of another person, parol evidence is admissible between the original parties, and against a purchaser with notice, to show that it was the intention of the parties to bind the principal, and not the agent; and if such intention is shown the instrument is held to be binding upon the principal, and not upon the agent.

EXCEPTION 2: INSTRUMENT PAYABLE TO CASHIER.

Where an instrument is drawn or indorsed to a person as cashier (or other fiscal officer) of a bank (or corporation), it is deemed *prima facie* payable to the bank (or corporation) of which he is such officer, and may be negotiated by either the indorsement of the bank (or corporation) or the indorsement of the officer.¹

Negotiable Instrument.

No one who is not named in or described as a party to a negotiable instrument can be charged or maintain an action upon it.² Parol evidence to show that the maker was acting as agent for an undisclosed or unnamed principal, for the purpose of charging him or enabling him to sue,

§§ 84-85. ¹ Following Neg. Inst. Law, § 72 (N. Y.); Norton, B. & N. (3d Ed.) 447. How far this rule is to be extended to officers other than bank cashiers, in jurisdictions where the negotiable instruments laws have not been enacted, is not clear. Post, p. 351.

² Ante, p. 244.

is therefore inadmissible.³ This rule rests upon the peculiar nature of the instrument. Parol evidence to show that a person who appears on the face of the instrument to be a party is not such is also inadmissible. This rule rests upon the ground that it is not competent by parol evidence to contradict the terms of a written contract, and is not confined to negotiable instruments.⁴ As in the case of a deed, therefore, the instrument, if made by an agent, to be the contract of the principal, must as a rule be made in his name; and, if made in the name of the agent, he, and he only, is a party.

Frequently, however, when both are named, it is difficult to determine from the instrument itself whether the promise is that of the principal or of the agent; and, even when only the agent is named, the instrument may contain some indication of an intention to bind the principal. Unfortunately the courts are not agreed as to whether it is ever permissible to resort to extrinsic evidence to ascertain the intention of the parties, nor are the courts which hold it permissible to resort to extrinsic evidence when the intention is not clear in accord as to the particular cases in which the exception is applicable.

Parol Evidence to Determine Whether Principal or Agent is Party.

The exception applicable to negotiable instruments which excludes extrinsic evidence for the purpose of charging or giving a right of action to an unnamed principal is derived from the nature of negotiable paper, which, being made for the very purpose of being transferred from hand to hand,

³ It may always be shown, however, that the principal was doing business in the agent's name, which may not infrequently happen in case of a partnership or corporation, and that the name signed is hence, in effect, the name of the principal. *Melledge v. Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; *Rumsey v. Briggs*, 139 N. Y. 823, 34 N. E. 929; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225.

⁴ Ante, p. 333.

must indicate on its face who the maker is. Moreover, any additional liability not expressed in the form of the paper could not be negotiable.⁵ Where these principles are strictly applied, it is held that any ambiguity arising upon the face of the instrument, in determining whether it is the promise of the principal or of the agent, must be solved without the aid of extrinsic testimony, and that the liability of the parties must be determined from the instrument itself.⁶

Therefore, when it does not otherwise sufficiently appear from the instrument that the agent executed it for his principal, although he adds to his signature words which, while descriptive of the relation in which he stood to another, are nevertheless construed by the courts to be mere *descriptio personæ*—such as “agent,” “trustee,” “treasurer,” “agent of A.,” “treasurer of the A. Company,” and the like—evidence is inadmissible to show that it was the intention of the parties that the contract should bind the principal, and the agent is personally bound.⁷

The tendency of the courts, however, has been to depart from this strict rule. It is universally conceded, indeed, that if there is nothing on the face of the paper to indicate the relation of the signer as agent to some other person, extrinsic evidence to discharge him or to charge an unnamed or undisclosed principal is inadmissible. But if such indication does appear, as where the maker adds to his signature words such as “Agent,” “Treasurer of the A. Company,”

⁵ Per Gray, J., in *Barlow v. Society*, 8 Allen (Mass.) 460.

⁶ *Barlow v. Society*, 8 Allen (Mass.) 460.

⁷ *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Arnold v. Sprague*, 34 Vt. 402; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409 (cf. *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421); *Collins v. Insurance Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Bank v. Cook*, 38 Ohio St. 442; *Robinson v. Bank*, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829; *Williams v. Bank*, 83 Ind. 237; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624.

and the like,* or where the indication otherwise appears upon the face of the instrument,* it is very generally held that, although the added words are prima facie mere descriptio personæ, yet, if it was understood between the immediate parties that the contract was in fact the contract of the principal, parol evidence of such intention is admissible, as between them, and as between the maker and a subsequent holder, who took with knowledge of the actual facts, for the purpose of showing that the obligation is in fact the principal's. "The evidence is not adduced," it is said, "to discharge the agent from a personal liability which he has as-

* *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665; *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 11 Sup. Ct. 360, 34 L. Ed. 1019; *Kean v. Davis*, 21 N. J. Law, 683, 47 Am. Dec. 182; *Brockway v. Allen*, 17 Wend. (N. Y.) 40, *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139; *Lafin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. R. 472; *Lockwood v. Coley* (C. C.) 22 Fed. 192; *Martin v. Smith*, 65 Miss. 1, 3 South. 83; *Keldan v. Winegar*, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705; *Second Nat. Bank v. Steel Co.*, 155 Ind. 581, 58 N. E. 833 (overruling earlier decisions); *La Salle Nat. Bank v. Rock & Rye Co.*, 14 Ill. App. 141; *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; *McClellan v. Reynolds*, 49 Mo. 312; *Kline v. Bank*, 50 Kan. 91, 31 Pac. 688, 18 L. R. A. 533, 34 Am. St. Rep. 107; *Miller v. Way*, 5 S. D. 468, 59 N. W. 467; *Janes v. Bank*, 9 Okl. 546, 60 Pac. 290.

* *Mechanics' Bank v. Bank*, 5 Wheat. (U. S.) 326, 5 L. Ed. 100. In this case a check, with the words "Mechanics' Bank of Alexandria," at the top and in the margin, drawn on the Bank of Columbia, and payable to the order of P. H. Minor, was signed Wm. Paton, Jr. Parol evidence was admitted to show that he was cashier of the former bank, and to establish the official character of the check. Johnson, J., said: "The appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added * * * that the cashier is the drawer, and the teller the payee, and the form of ordinary checks deviated from by the substitution of 'to order' for 'to bearer.' The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction." This is a leading case upon the admission of parol evidence, and carries the doctrine to its extreme limit. Post, p. 344.

sumed, but to prove that in fact he never incurred that liability; not to aid in the construction of the instrument, but to prove whose instrument it is."¹⁰

Inasmuch as this rule, or exception, is confined to cases where an indication of the representative character of the maker appears upon the face of the instrument, it would seem that it should be applicable even against a subsequent holder who was ignorant of the actual facts, since he would be charged with constructive notice of whatever appeared upon the face of the instrument, and would hence, apparently, be put upon inquiry as to the circumstances of its execution. And it is held, where this rule prevails, that the ambiguity may be so grave as to charge him with constructive notice.¹¹ Nevertheless, it is held that the mere addition to the signature of the words "Agent," "Trustee," "Treasurer," and the like does not of itself make third persons chargeable with notice of any representative relation of the signer.¹² As to what indication would be necessary to charge a purchaser with notice, it is impossible to formulate any rule.

When Principal Bound.

Where an agent draws a bill or makes a note and signs the name of his principal, without more, the principal is bound.¹³ Usually, however, he indicates in some manner

¹⁰ Per Green, C. J., in *Kean v. Davis*, 21 N. J. Law, 683, 47 Am. Dec. 182.

¹¹ In *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665, speaking of a check in ordinary form, signed "B., Secy. C., V. Pres't," Bradley, J., said: "It is unnecessary to determine whether the form * * * was sufficient to charge innocent holders of the check with notice of its character. The fact that it bore two official signatures * * * is so unusual on the hypothesis of its being an individual transaction, and points so distinctly to an official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character." But see *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705, and *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038.

¹² *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665.

¹³ *Forsyth v. Day*, 41 Me. 382; *First Nat. Bank v. Loyhed*, 28 Minn. 396, 10 N. W. 421.

that the signature is by his hand. Any one of the following forms of signature is sufficient: "A., by B.," "B., for A.," or "for A., B.,"¹⁴ "pro A., B.,"¹⁵ "B., Agent for A."¹⁶ In all these cases it appears that the agent subscribes "for" the principal, or by procuration, and that he is the mere scribe. The variation between signing as agent "for" and agent "of" seems very slight, but, as we shall see, it is material.¹⁷ It is not essential, however, that the signature should be in any of the above forms, if it otherwise appear from the instrument that the agent signs for the principal. Wherever it appears upon the face of the instrument "made by the agent of one named therein, and whom he can legally bind thereby, that he acts as agent and intends to bind his principal, the law will give effect to the intention, in whatever form expressed."¹⁸ Sufficient indications that the agent so acts and intends may appear in the recitals or other terms embodied in the instrument, and such a construction may be aided by the fact that the name of the principal is printed at the head or in the margin of the instrument, taken in connection with other indications.

Leaving out of question the disagreement whether extrinsic evidence is ever admissible, "the difficulty is not in ascertaining the general principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments."¹⁹ In

¹⁴ *Ex parte Buckley*, 14 M. & W. 469; *Alexander v. Sizer*, L. R. 4 Ex. 102; *Emerson v. Manufacturing Co.*, 12 Mass. 237, 6 Am. Dec. 66; *Rice v. Grove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; *Olcott v. Little*, 9 N. H. 259, 32 Am. Dec. 357; *Rawlings v. Robson*, 70 Ga. 595. See *Barlow v. Society*, 8 Allen (Mass.) 460.

¹⁵ *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160.

¹⁶ *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Jefts v. York*, 4 Cush. (Mass.) 372, 50 Am. Dec. 791; *Tiller v. Spradley*, 39 Ga. 38. Cf. *De Witt v. Walton*, 9 N. Y. 571; *Shattuck v. Eastman*, 12 Allen (Mass.) 369.

¹⁷ *Per Gray, J., in Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101. Post, p. 347.

¹⁸ *Barlow v. Society*, 8 Allen (Mass.) 460.

¹⁹ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

applying them it is inevitable that similar, or even identical, instruments should be differently construed by different courts, and it is not possible here to do more than illustrate the principles to be applied and the diversity of result in their application by a few examples.

Thus, where a note read: "Lee, April 26, 1858. On demand, I, as treasurer of the Congregational Society, or my successors in office, promise to pay;" and was signed "B. Treasurer"—it was held to be the note of the society. Here the principal was named, and the promise was by the signer "as treasurer of" the society, and by him or his "successors," which could not be if the note were his personal act, and the designation of his office was repeated after his signature.²⁰

So a note which read, "We, the undersigned, committee for the first school district, promise in behalf of said school district," signed by the individual members of the committee, with the word "Committee" opposite their names, was held not to be the note of the members.²¹

So a note which read, "We promise to pay on account of" the A. Company, signed "B., C., D., Directors," and counter-signed "E., Secretary," was held to be the note of the Company.²² So a note which read, "We, as trustees of the A. Company, promise," signed "B., C., D., Trustees of the A. Company," was held to be the note of the company.²³ It is

²⁰ Barlow v. Society, 8 Allen (Mass.) 480.

²¹ Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521. See, also, Aggs v. Nicholson, 1 H. & N. 165.

²² Lindus v. Melrose, 2 H. & N. 293. But see Allan v. Miller, 22 L. T. 825.

In Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234, it was held that a note whereby "the Western Seaman's Friend Society agrees to pay," signed "B., Gen. Supt.," was so ambiguous that whether it was the obligation of the society or of B. was a question of fact.

²³ Blanchard v. Kaull, 44 Cal. 440. But see Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175. Cf. New Market Sav. Bank v. Gillett, 100 Ill. 254, 39 Am. Rep. 39.

In Mann v. Chandler, 9 Mass. 335, a note expressed to be made by

to be noticed that in these cases the signatures were accompanied with the official designation of the signers, without which the opposite conclusion might have been reached.²⁴ In such cases, however, where the rule admitting extrinsic evidence in case of ambiguity prevails, the principal might be charged by proof that he was understood by the parties to be the real principal.

Same—Indications on Face of Paper—Headings.

Where the agent draws a bill of exchange and signs it as "agent," sufficient indication that he is acting as agent may appear by a direction to charge it to a person named therein. Thus a draft not naming the principal otherwise than by concluding, "and charge the same to the A. Company," signed "B., Agent," was held the draft of the company.²⁵ And, although the principal is not otherwise named, it has been held that when the name of a company or corporation is printed at the top or in the margin of the draft, and the draft is signed as "agent," the principal, as well as the fact that it is drawn on his behalf, is sufficiently disclosed, and the principal is bound. Thus a check directing payment to

"I, the subscriber, treasurer of the A. Turnpike Corporation," and signed "B., Treasurer of A. Turnpike Corporation," was held the note of the corporation. In *Barlow v. Society*, 8 Allen (Mass.) 460, it is said that this case must be maintained, if at all, upon the ground that the treasurer of a corporation is by virtue of his office the hand by which the corporation conducts its pecuniary affairs, assimilating his note to that of a cashier of a bank.

²⁴ *Fogg v. Virgin*, 19 Me. 352, 36 Am. Dec. 757; *Pack v. White*, 78 Ky. 243; *McKensey v. Edwards*, 88 Ky. 272, 10 S. W. 815, 3 L. R. A. 397, 21 Am. St. Rep. 339.

The mere insertion of "for" or "on behalf of" the principal in the body of the note does not make it his contract, if signed by the name of the agent without addition. *Bradlee v. Manufactory*, 16 Pick. (Mass.) 847; *Morell v. Coddling*, 4 Allen (Mass.) 403.

²⁵ *Tripp v. Paper Co.*, 13 Pick. (Mass.) 291.

Otherwise if signed by the agent without addition. *Mayhew v. Prince*, 11 Mass. 54; *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390.

C., and signed "B., Treasurer," with the words "Ætna Mills" printed on the margin, was held to bind the corporation, and not B.²⁶ And a similar holding was made where a draft was signed "F. and C.," but at the top of the paper was printed "New England Agency of the Pennsylvania Fire Insurance Company," and in the margin "F. & C., General Agents for the New England States."²⁷ So where a draft had the words "Office of the A. Company, Hancock, Michigan," printed at the top, and was signed "B., Agent," it was held that he could not be personally charged.²⁸ Such cases can hardly be reconciled with other cases of notes with the name of a corporation printed at the top or in the margin, and signed by the maker as "Agent," which have nevertheless been held to be the personal obligation of the signer. Thus, a note in form, "We promise to pay," headed "Midland Counties Building Society, No. 3," and signed "B., C., Trustees, D., Secretary," was held to bind the signers personally. "Midland Counties Building Society, No. 3," it was said, "may be the name of the place from which the note is dated; the promise is not qualified."²⁹ And where a note was in form, "We promise to pay," and signed "B., Pres't., C., Treas.," with the words "A. Co." printed across the end, it was held the personal obligation of the signers.³⁰

²⁶ *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360.

A bill headed "Office of the A. Co.," and concluding charge same to account of "A. Co.," and signed "B., Pres't., C., Sec'y.," is the bill of the company. *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078. See, also, *Mechanics' Bank v. Bank*, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; *Fuller v. Hooper*, 3 Gray (Mass.) 334.

²⁷ *Chipman v. Foster*, 119 Mass. 189.

²⁸ *Slawson v. Loring*, 5 Allen (Mass.) 340, 343, 81 Am. Dec. 750.

²⁹ *Price v. Taylor*, 5 H. & N. 540. Contra, *Lacy v. Lumber Co.*, 43 Iowa, 510. A note was signed "B., President," and above the note appeared the name of a corporation. Held, that the presumption that the note was the individual obligation of the signer was not conclusive, and parol evidence was admissible to show that it was the note of the corporation.

³⁰ *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am.

Same—Signature by Corporation.

Where there is nothing in the body of the instrument to indicate on whose behalf it is made, but it bears the signature of a corporation, followed by the name of a person describing himself as an officer, it is generally held that the corporation, and not the agent, is bound.⁸¹ Thus where a note read, "We promise to pay," and was signed "Warrick Glass Works," and thereunder appeared the name of "J. Price Warrick, Pres.," it was held to be the note of the corporation. "The name of a corporation, so placed," said the court, "raises the implication of a corporate liability. * * * The name of an officer of such corporation, to which name the official title is appended, but beneath the corporate name, implies the relation of principal and agent. It means that, inasmuch as every corporate act must be done by the hand of a natural person, this person is the agent by whose hand the corpora-

St. Rep. 705. "It was competent for its officers," said Gray, J., "to obligate themselves personally * * *; and, apparently to the world, they did so by the language of the note, which the mere use of a blank form of note having upon its margin the name of their company was insufficient to negative." This was an action by a purchaser of the note, and it was conceded that, if it had had knowledge that the note was between the parties intended to be a corporate obligation, the signers could not be charged; but it was held that it was not so charged by the manner of the execution. To the same effect, *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038, affirming 80 Hun, 435, 30 N. Y. Supp. 83. Cf. *Second Nat. Bank v. Steele Co.*, 155 Ind. 581, 58 N. E. 833.

⁸¹ *Reeve v. Bank*, 54 N. J. Law. 208, 23 Atl. 853, 16 L. R. A. 143, 83 Am. St. Rep. 675; *Liebscher v. Kraus*, 74 Wis. 387, 43 N. W. 160, 5 L. R. A. 496, 17 Am. St. Rep. 171.

See, also, *Draper v. Heating Co.*, 5 Allen (Mass.) 838; *Castle v. Foundry Co.*, 72 Me. 167; *Bean v. Mining Co.*, 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106 (parol evidence admissible).

An indorsement, "Estate of A., B., Executor," does not bind the executor personally, though the estate may not be bound. *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. Rep. 303.

tion did the particular act."⁸² The use of the word "we" raises no implication that the note is the joint note of the corporation and the officer, the word "we" being often used by corporations. The cases are, however, conflicting. Such a note has been held the joint note of the corporation and of the officer.⁸³ Where, in lieu of a written signature, the seal of the corporation containing its name is affixed in the proper place, the effect is the same as if the name had been signed.⁸⁴

When Agent Bound.

When an agent makes a negotiable instrument and signs it with his own name, although with the addition of the word "Agent," even of a named person, he is nevertheless personally bound thereby, unless it otherwise appears from the instrument that he acts as agent and intends to bind the principal. "Is it not a universal rule," said Lord Ellenborough, "that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable."⁸⁵ The agent is therefore bound, when there are not sufficient words of exclusion elsewhere in the instrument, if he signs "B., Agent,"⁸⁶ "B., Trustee,"⁸⁷ "B.,

⁸² *Reeve v. Bank*, 54 N. J. Law, 208, 23 Atl. 853, 16 L. R. A. 143, 33 Am. St. Rep. 675.

⁸³ *Mathews v. Mattress Co.*, 87 Iowa, 246, 54 N. W. 225, 19 L. R. A. 676; *Heffner v. Brownell*, 70 Iowa, 591, 31 N. W. 947.

⁸⁴ *Miller v. Roach*, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71; *Means v. Swarmstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624; *Guthrie v. Imbrie*, 12 Or. 182, 6 Pac. 664, 53 Am. Rep. 331.

⁸⁵ *Leadblitter v. Farrow*, 5 M. & S. 345.

⁸⁶ *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Cortland Wagon Co. v. Lynch*, 82 Hun. 173, 31 N. Y. Supp. 325; *Manu-*

⁸⁷ *Price v. Taylor*, 5 H. & N. 540.

Agent of A.,"³⁸ "B., President [or Treasurer],"³⁹ "B., President [or Treasurer, or Trustee, etc.] of the A. Company."⁴⁰ Thus, where a bill read, "Pay to the order of C., * * * and charge the same to the account of [signed] B. & Co., Agts. A. Ins. Co.," and was addressed to the "A. Insurance Co.," it was held that B. & Co. were bound. "A mere description of the general relation or office which the person signing the paper holds to another person or to a corporation," said the court, "without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from liability."⁴¹ This is subject, of course, to the qualification that in many jurisdictions the liability of the agent so signing is, except as against a purchaser for value without notice, only *prima facie*, and that extrinsic evidence is admissible to show that the intention of the parties was that the principal should be so bound.⁴²

facturers' & Traders' Bank v. Love, 18 App. Div. 561, 43 N. Y. Supp. 812; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Anderton v. Shoup*, 17 Ohio St. 125; *Ohio Nat. Bank v. Cook*, 38 Ohio St. 442; *Stinson v. Lee*, 68 Miss. 113, 8 South. 272, 9 L. R. A. 830, 24 Am. St. Rep. 257; *Sparks v. Transfer Co.*, 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351 (and cases cited).

³⁸ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

³⁹ *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193.

⁴⁰ *Fiske v. Eldridge*, 12 Gray (Mass.) 474; *Haverill Mut. Fire Ins. Co. v. Newhall*, 1 Allen (Mass.) 130; *Seaver v. Coburn*, 10 Cush. (Mass.) 324; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 98, 20 Am. Dec. 664; *Hills v. Bannister*, 8 Cow. (N. Y.) 31; *Ohio Nat. Bank v. Cook*, 38 Ohio St. 442; *Tilden v. Barnard*, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197; *Fowler v. Atkinson*, 6 Minn. 578 (Gil. 412); *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Coburn v. Lodge*, 71 Iowa, 581, 32 N. W. 513.

⁴¹ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

⁴² *Ante*, p. 339.

Same—Acting Without Authority—Negotiable Instruments Law.

The negotiable instruments law provides that "where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument *if he was duly authorized*; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."⁴³ The effect of the words in italics appears to be to render an agent who signs in a representative capacity, but without authority, liable on the instrument; thus making for the parties a contract which was not in contemplation, and changing the common-law rule that one who contracts in the name of an ostensible principal is not liable upon the contract, his only liability on contract being upon an implied warranty of authority.⁴⁴ This change has been justly condemned, and the amendment of the section by striking out the words "if he was duly authorized" has been urged.⁴⁵

Agent as Payee and Indorser.

When a negotiable instrument is made or indorsed to an agent in his own name, with added words descriptive of his relation as agent of another person, named or unnamed, the same conflict of authority prevails as to who is the payee or indorsee, and consequently as to who is the proper person to bring suit and to indorse. It is generally held that the agent, although described as agent of a named principal, may maintain an action upon the instrument in his own name.⁴⁶ But, when the payee is described as treasurer or

⁴³ N. Y. Laws 1897, c. 612, § 39. See Norton, Bills & N. (3d Ed.) Appendix, 442, § 39 (20).

⁴⁴ Post, p. 369.

⁴⁵ Prof. J. B. Ames, 16 Harv. L. Rev. 256.

⁴⁶ Chadsey v. McCreery, 27 Ill. 253; Ord v. McKee, 5 Cal. 515.

Where a bill is payable to the order of "B., Treasurer," he may

other officer of a corporation named, it is often held that the corporation is the payee.⁴⁷ When the instrument is payable to a person as "Agent," and he indorses in that form, the same diversity exists as to who is bound by the indorsement. Where the rule excluding parol evidence is strictly maintained there can be no recovery against the principal upon an indorsement in the name of the agent, though he describe himself as such. Thus, in a Massachusetts case, where a bill was payable to and indorsed by "B., Agent," in an action against him as indorser it was held that parol evidence was inadmissible to show that he was merely agent, and that the plaintiff knew the fact. "The defendants," said Gray, C. J., "appeared upon the face of the bill to be themselves the payees and indorsers, and the word 'Agents' was a mere designatio personarum, and parol evidence was inadmissible to discharge them."⁴⁸ But in a Minnesota case, where a note was payable to and indorsed by "B., Treasurer," it was held that the indorsement was prima facie his individual contract, but that extrinsic evidence was admissible to show that he made it only in his official capacity as treasurer of the maker corporation.⁴⁹ It has also been held that where a note is payable to "B.," by indorsing "B., Agent," the indorsement is qualified, and he relieves himself from liability as indorser;⁵⁰ and the same holding was made where

indorse it personally or by attorney. *Shaw v. Stone*, 1 Cush. (Mass.) 228.

⁴⁷ *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539; *Vater v. Lewis*, 36 Ind. 228, 10 Am. Rep. 29; *Falk v. Moebs*, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266.

⁴⁸ *Bartlett v. Hawley*, 120 Mass. 92. See, also, *Towne v. Rice*, 122 Mass. 67 (B., Receiver).

Where a note was payable to "B., Agent," and indorsed, "A. Co., B., Agent," the indorsement was B.'s. *Mann v. Bank*, 34 Kan. 746, 10 Pac. 150.

⁴⁹ *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1116. See, also, *Babcock v. Beman*, 11 N. Y. 200.

A bill payable to "B., Agent," and so indorsed, binds the principal. *Merchants' Bank v. Bank*, 1 Ga. 418, 44 Am. Dec. 665.

⁵⁰ *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

a note was payable to and indorsed "B., Treasurer."⁸¹ There is, moreover, a tendency to assimilate indorsements by the treasurer or managing officer of a corporation to indorsements by bank cashiers, to be considered in the next paragraph.

Same—Cashier of Bank—Officer of Corporation.

To the rule that one who is not named as a party to a negotiable instrument cannot maintain an action or be charged thereon there is an apparent exception, applicable to paper payable to the cashier of a bank, which prevails even where parol evidence is in other cases inadmissible to show the intention of the parties. By usage the name of such officer, with his title "Cashier," has become established as the alternative designation of the bank. Where paper is so made payable to him, an action may be maintained thereon by the bank⁸² or by the cashier;⁸³ and, when indorsed by him in the same form, the indorsement is the indorsement of the bank, which may be charged thereon.⁸⁴ There is a tendency to apply the same rule to paper made payable to the treasurer or managing officer of other corporations.⁸⁵

⁸¹ Babcock v. Beman, 11 N. Y. 200.

⁸² First Nat. Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698; Water-vliet Bank v. White, 1 Denio (N. Y.) 608; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Barney v. Newcomb, 9 Cush. (Mass.) 46; Bank of Manchester v. Slason, 13 Vt. 334; Dutch v. Boyd, 81 Ind. 146; Nave v. Bank, 87 Ind. 204; Garton v. Bank, 34 Mich. 279; Baldwin v. Bank, 1 Wall. (U. S.) 234, 17 L. Ed. 534.

⁸³ Fairfield v. Adams, 16 Pick. (Mass.) 381; McHenry v. Ridgely, 2 Scam. (Ill.) 309, 35 Am. Dec. 110.

⁸⁴ Bank of Genesee v. Bank, 13 N. Y. 309; Bank of New York v. Bank, 29 N. Y. 619; Collins v. Johnson, 16 Ga. 458; Bank of State v. Wheeler, 21 Ind. 90; Houghton v. Bank, 26 Wis. 663, 7 Am. Rep. 107.

⁸⁵ Chillicothe Branch of State Bank v. Fox, 3 Blatchf. 431, Fed. Cas. No. 2,683; Babcock v. Beman, 11 N. Y. 200; Nichols v. Frothingham, 45 Me. 220, 71 Am. Dec. 539; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29.

A note payable to the "A. Co.," and indorsed "B., President," or

The negotiable instruments law provides: "Where an instrument is drawn or indorsed payable to a person as 'cashier' or other fiscal officer of a bank or corporation, it is deemed to be prima facie payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer."⁵⁶

Agent as Acceptor of a Bill.

Except in so far as affected by the rule that a bill can be accepted, except for honor, only by the drawee and by the anomalous doctrine of unsigned and oral acceptances, the same considerations which determine the liability of the principal or of the agent upon a note or a bill made or drawn by the agent determine their liability upon an acceptance made by him. When a bill is drawn on an agent in his own name, whether described with or without addition as "Agent," and is accepted by him in his own name, he is liable as acceptor, even if he adds to his signature words indicating that he signs for and on behalf of a principal.⁵⁷

"Treasurer," or "Secretary," transfers the title. *Chillicothe Branch of State Bank v. Fox*, *supra*; *Nicholas v. Oliver*, 36 N. H. 218; *Russell v. Folsom*, 72 Me. 436.

"The usage is universal for presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make, in their behalf, indorsements and transfers of negotiable paper, by simply indorsing their names, with additions of their titles of office. I cannot doubt that such indorsement is sufficient to charge the corporation under whose authority the indorsement is made, and to transfer the note to the indorsee, so that the latter can maintain an action thereon in his own name." *Per Hall, J.*, in *Chillicothe Branch of State Bank v. Fox*, *supra*.

A note signed, "A. Co., B., Sec. and Treas.," and payable to and indorsed "B., Sec. & Treas.," held to be the note and indorsement of the A. Co., and unambiguous, and parol evidence inadmissible to show that the indorsement was that of B. personally. *Falk v. Moeba*, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266.

⁵⁶ See Norton, B. & N. (3d Ed.), appendix, 447, § 72 (42).

⁵⁷ *Mare v. Charles*, 5 El. & B. 978.

Where a bill, headed "Office of A. Co.," was drawn by "B., Agent,"

Thus, where a bill was drawn on B., who wrote across it, "Accepted for the Company, B., Purser," he was personally liable.⁵⁸ And the same rule has been applied when the bill is addressed to him as agent of a named principal, and is accepted by him as such agent.⁵⁹ In jurisdictions where parol evidence is admitted, it would, however, be admissible in such cases to show that it was the intention of the parties to bind the principal.⁶⁰ But, when the bill is drawn on the agent in his own name, if he accepts in the name of the principal neither is bound—not the principal, because he was not named as drawee, nor the agent, because by the manner of acceptance he has disclaimed personal responsibility.⁶¹

Conversely, where a bill is drawn on the principal, and is accepted by the agent in his own name, the agent is not liable.⁶² It does not follow, however, that the principal may not be bound by such an acceptance. Great looseness has prevailed in respect to the formal requisites of an acceptance,

and addressed to "C., Agent," who wrote across it, "Accepted, C., Agent," he was personally bound. *Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750.

The drawee of a bill drawn by the "A. Co." was described as "B., Agent," and accepted as "B., Agent A. Co." Held, that he was personally bound, and that in a suit by an indorsee parol evidence was not admissible to show intention to bind the company, and that the plaintiff purchased with knowledge of this fact. *Robinson v. Bank*, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829. See *Bowstead*, Dig. Ag. art. 109.

⁵⁸ *Mare v. Charles*, 5 El. & B. 978.

⁵⁹ *Jones v. Jackson*, 22 L. T. 828; *Moss v. Livingston*, 4 N. Y. 209. *Contra*, *Shelton v. Darling*, 2 Conn. 435.

⁶⁰ *Laffin & Rand Powder Co. v. Sinshelmer*, 48 Md. 411, 30 Am. Rep. 472.

⁶¹ *Walker v. Bank*, 9 N. Y. 582.

Where a bill was drawn on "B., Purser A. Company," and was accepted, "B., per proc. A. Company," B. being a member of the company, which was unincorporated, he was personally liable. *Nichols v. Diamond*, 9 Ex. 154.

⁶² *Pothill v. Walker*, 3 B. & Ad. 114. Cf. *Okell v. Charles*, 34 L. T. 822.

and, in the absence of any statutory requirements to the contrary, unsigned, and even oral, acceptances have been sustained. Thus, when a bill is addressed to several persons, and is accepted by one, he being the duly authorized agent of the others, by writing his name on the bill, it has been held that all are liable as acceptors, though the acceptance does not purport to be in the name of or on behalf of all.⁶³ And it has even been held, where a bill was addressed to A., and accepted by his wife by writing across it her own name, and A., on presentation, promised to pay it, that he was liable as acceptor, his promise being sufficient evidence of authority or of ratification.⁶⁴ In many jurisdictions to-day it is provided by statute that the acceptance must be in writing and signed by the drawee,⁶⁵ and where this requirement exists the cases last referred to would not be precedents.⁶⁶

Public Agents.

It has been pointed out that where a contract is entered into on behalf of the government by a public agent, notwith-

⁶³ *Jenkins v. Morris*, 16 M. & W. 877.

This rule was applied to bills drawn upon a partnership and accepted by one partner, only his name appearing in the written acceptance. *Mason v. Rumsey*, 1 Camp. 384; *Wells v. Masterman*, 2 Esp. 731; *Beach v. Bank*, 2 Ind. 488; 1 Ames, Cas. B. & N. 206, n. 1.

"It would have been enough if the word 'Accepted' had been written on the bill, and the effect cannot be altered by adding 'T. Rumsey, Sen.'" Per Lord Ellenborough in *Mason v. Rumsey*, *supra*.

⁶⁴ *Lindus v. Bradwell*, 5 C. B. 583. See Bowstead, Dig. Ag. art. 89.

⁶⁵ Neg. Inst. Law, § 220; Norton, B. & N. (3d Ed.) 472. Cf. § 224.

⁶⁶ *Heenan v. Nash*, 8 Minn. 407 (Gil. 363), 83 Am. Dec. 790.

In this case it was held that where a bill was addressed to a firm, and accepted by an individual member in his own name, neither the partnership nor the member accepting were bound. The statute provided that no person should be charged as acceptor, unless his acceptance should be "in writing, signed by himself or his lawful agent."

"If a draft were drawn on a corporation by name, and accepted by its duly authorized agent or officer in his individual name, adding his official designation, the acceptance would be deemed that of the corporation, for only the drawee can accept a bill." Per Mitchell, J., in *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1116.

standing that the agent executes it in his own name, it is the contract of the government.⁸⁷ It seems that the same rule is applicable to negotiable paper, and it has frequently been held that where an instrument executed by a public agent contains words which, if used by a private agent, would be deemed mere *descriptio personæ*, the principal, and not the agent, is bound.⁸⁸ In other cases, however, the distinction has been disregarded.⁸⁹

PARTIES TO CONTRACT NOT SEALED OR NEGOTIABLE.

86. When an agent contracts personally, he is liable upon the contract. In such case, if the contract is not sealed or negotiable, the principal is also liable thereon, provided it was authorized.

EXCEPTION 1: EXCLUSIVE CREDIT TO AGENT. When the other party to the contract knows that the person with whom he deals is agent, and who the principal is, and the contract is on such terms that exclusive credit is given to the agent, the agent only is liable thereon.

EXCEPTION 2: FOREIGN PRINCIPAL. In England (it seems), but not in the United States, when an agent contracts on behalf of a foreign principal, he is presumed to contract personally, unless a contrary intention appears from the terms of the contract or from the surrounding circumstances.

SAME-WRITTEN CONTRACT.

87. Where the contract is in writing, whether the agent is deemed to have contracted merely as agent, or personally, depends upon the intention of the parties, as disclosed by the terms of the instrument as a whole, the construction of which is for the court.

⁸⁷ Ante, p. 838.

⁸⁸ Jones v. Le Tombe, 3 Dall. (U. S.) 384, 1 L. Ed. 647; School Town of Monticello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139; Sanborn v. Neal, 4 Minn. 128 (Gil. 83), 77 Am. Dec. 502. Cf. Fowler v. Atkinson, 6 Minn. 579 (Gil. 412).

⁸⁹ Schools of Village of Cahokla v. Rautenberg, 88 Ill. 219; Wing v. Glick, 56 Iowa, 473, 9 N. W. 394, 41 Am. Rep. 118.

SAME—PAROL EVIDENCE.

87a. When the agent appears by the terms of the writing to have contracted personally, parol evidence is inadmissible to show that in fact he merely contracted as agent, and was not intended to be personally liable.

EXCEPTION: In some jurisdictions, if the agent is described as such, and it does not otherwise clearly appear by the instrument that he contracted personally, he is only *prima facie* liable, and may show by extrinsic evidence that he was not intended to be bound.

SAME—ORAL CONTRACT.

88. When the contract is not in writing, whether the agent is deemed to have contracted merely as agent, or personally, is a question depending upon the intention of the parties, as disclosed by all the circumstances of the transaction, and is for the jury.

PUBLIC AGENT.

89. A public agent is not liable upon a contract entered into by him on behalf of the government, unless it clearly appears that he pledges his personal credit.

WHEN APPARENT AGENT IS REAL PRINCIPAL

90. When a person professes to contract as agent, whether in writing or orally, evidence is admissible to prove that he was the real principal, and to charge him personally.

Written Contract.

As we have seen, when a contract not under seal or negotiable is made by the agent, which is in terms his contract, both principal and agent are bound. The principal is liable, although undisclosed; for, notwithstanding that the contract is in writing, parol evidence is admissible to charge him,¹ and the agent is liable because he has so contracted.

The agent may, however, contract on behalf of the principal, so as to bind him only. Whether a written contract, not under seal or negotiable, is to be deemed the personal contract of the agent or the contract of his principal, depends upon the intention of the parties as disclosed by the writing. The technical rules governing the execution of contracts under seal do not apply, and a somewhat more liberal interpretation than prevails in respect to negotiable instruments is adopted. If the meaning is clear, it matters not how the contract is phrased, nor how it is signed, whether by the name of the agent for the principal, or with the name of the principal by the agent, or merely in the name of the agent.²

If, indeed, the contract is signed in the name of the agent without qualification, and no sufficient indication of a contrary intention appears upon the face of the instrument, he is conclusively bound;³ but if a contrary intention does appear it will control.⁴

Thus, when the writing states that the undertaking is "on account of,"⁵ or "in behalf of,"⁶ a named principal, although the signature is unqualified, the principal, and not the agent, is bound. The mere fact, however, that the agent describes

² *Spittle v. Lavendar*, 2 B. & B. 452; *Southwell v. Bowditch*, 1 C. P. D. 374; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *New England Marine Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Goodenough v. Thayer*, 132 Mass. 152; *Rogers v. March*, 33 Me. 100; *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. 346.

³ *Kennedy v. Gouveia*, 3 D. & R. 503; *Pace v. Walker*, L. R. 5 Ex. 173; *Miller v. Early* (Ky.) 58 S. W. 789.

⁴ *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Fowle v. Kerchner*, 87 N. C. 47.

⁵ *Gadd v. Houghton*, 1 Ex. D. 357. See, also, *Fairlie v. Fenton*, L. R. 5 Ex. 169.

⁶ *Ogden v. Hall*, 40 L. T. 751; *Key v. Parnham*, 6 Har. & J. (Md.) 418. See, also, *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521.

Otherwise if in another part of the contract the agent undertakes personally. *Norton v. Herron*, 1 C. & P. 648 (the said G. H. doth hereby agree); *Tanner v. Christian*, 4 El. & B. 591.

himself as agent, whether in the body of the instrument⁷ or in the signature,⁸ even though the principal be named, is insufficient to show that he does not intend to contract personally. Even a contract in which the agent contracts "as agent of A." has been held binding upon him personally,⁹ though this case has been doubted.¹⁰ "Although an agent is duly authorized," said Shaw, C. J., "if by the terms of his contract he binds himself personally, and engages expressly in his own name to pay or perform other obligations, he is responsible, though he describes himself as agent."¹¹

The constructions placed by different courts upon similar instruments are frequently irreconcilable, and very slight in-

⁷ *Burwell v. Jones*, 3 B. & Ald. 47; *Paice v. Walker*, L. R. 5 Ex. 173; *Parker v. Winslow*, 7 El. & B. 842; *Kennedy v. Gouveia*, 3 D. & R. 503; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Guernsey v. Cook*, 117 Mass. 548; *Grau v. McVicker*, 8 Biss. (U. S.) 13, Fed. Cas. No. 5,706; *Matthews v. Jenkins*, 80 Va. 463.

⁸ *Brown v. Bradley*, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 480.

This was an action to recover a reward which was offered in a writing in the following terms: "\$2,500 reward will be paid to any person furnishing evidence that will lead to the arrest and conviction of the person who shot X. [Signed] B., C., D., Selectmen of Milton." It was held that the defendants were personally liable. "Perhaps," said Holmes, J., "our conclusion is a little strengthened by the consideration that * * * the defendants had not authority to bind the town for more than \$500. For although, of course, an agent does not make a promise his own by exceeding his authority, if it purports to bind his principal only, still, when the construction is doubtful, the fact that he has no authority * * * is a reason for reading his words as directed towards himself." See, also, *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; *MacDonald v. Bond*, 195 Ill. 122, 62 N. E. 881.

⁹ *Paice v. Walker*, L. R. 5 Ex. 173. In this case the language was, "Sold A. B. 200 quarters of wheat (as agent of C., F. & Co., Danzig)."

¹⁰ *Gadd v. Houghton*, 1 Ex. D. 357.

"As" preceding "agent," "trustee," and the like indicates that the person referred to contracts in his representative capacity. *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925.

¹¹ *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

dications of an intention to bind the principal are frequently construed as controlling the presumption that words descriptive of the relation are to be deemed mere descriptio personæ.¹³ Conversely, if the agent adds to his signature words indicating that he signs for and on behalf of his principal, he is not personally liable unless a contrary intention is elsewhere disclosed,¹⁴ but, if so disclosed, it will be given effect.¹⁴ The agent may also use such words as to bind both the principal and himself, as where he contracts for the principal and assumes the obligation of a surety.¹⁵

¹³ *Cook v. Gray*, 133 Mass. 106; *Rogers v. March*, 33 Me. 106; *State v. Commissioners*, 60 Neb. 566, 83 N. W. 733.

The introductory clause of a lease read, "This agreement made * * * between B., Agent of A.," and the signature was in the same form. "It clearly appears," said the court, "that B. was the agent of the lessor, and acted as such, for we find this recital: 'That the said B., agent as aforesaid, has rented. * * * There are other provisions in the instrument clearly showing that B. executed the lease as the agent of A., and we have no doubt that it should be treated as having been executed by him.'" *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680.

An agreement between "W., superintendent of the K. Mining Company, parties of the first part, and P., party of the second part," by which "the said parties of the first part" agree to deliver at P.'s mill ore from the K. mine to be milled by P., and signed "W., Supt. K. Mining Co.," is the contract of the company. "By the subject-matter of this contract," said Gray, J., "which is the delivery and milling of ore from the Keets mine; by the description of Whitney, both in the body of the contract and in the signature, as superintendent of the Keets Mining Company; and by the use of the words 'parties of the first part,' which are applicable to a company and not to a single individual—the contract made by the hand of Whitney clearly appears upon its face to have been intended to bind, and therefore did bind, the company; and, upon proof that Post was a partner in the company, bound him." *Post v. Pearson*, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774.

¹⁴ *Deslands v. Gregory*, 30 L. J. Q. B. 36; *Lyon v. Williams*, 5 Gray (Mass.) 557; *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366.

¹⁵ *Lennard v. Robinson*, 5 Bl. & B. 125; *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

¹⁶ *Young v. Schuler*, 11 Q. B. D. 651.

Same—Parol Evidence.

The construction of a written instrument is for the court.¹⁶ Where it clearly appears from the contract that the agent contracts personally, parol evidence is inadmissible to show that he contracted as agent, and that it was not the intention of the parties that he should be personally bound, for such evidence would contradict the written contract.¹⁷ In case of ambiguity, parol evidence may be admitted.¹⁸ It seems that although the instrument contains words describing the agent as such, if upon ordinary principles of construction the words are to be taken as mere descriptio personæ, and there is no further indication of intention to bind the principal, parol evidence is not admissible to control the construction.¹⁹ In some jurisdictions, however, it has been held that where such words as "agent," "trustee," and the like are affixed to the name of a party to the contract they are prima facie descriptive only, but that it may be shown by extrinsic evidence that they were intended and understood by the parties as determining the character in which he contracted.²⁰

¹⁶ *Tanner v. Christian*, 4 El. & B. 591; *Southwell v. Bowditch*, 1 C. P. D. 374; *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925.

¹⁷ *Jones v. Littledale*, 6 Ad. & E. 486; *Higgins v. Senior*, 8 M. & W. 834; ante, p. 233.

When an invoice is only evidence of a contract, and not the contract, parol evidence is admissible to show that a person whose name appears at the head as seller is not in fact a contracting party. *Holding v. Elliott*, 5 H. & N. 117.

¹⁸ *McCollin v. Gilpin*, 6 Q. B. D. 516. See, also, *Ziegler v. Fallon*, 28 Mo. App. 295; *Becker v. Lamont*, 13 How. Prac. (N. Y.) 23; *State v. Commissioners*, 60 Neb. 566, 83 N. W. 733; *De Remer v. Brown*, 165 N. Y. 410, 59 N. E. 129.

¹⁹ *Jones v. Littledale*, 6 Ad. & E. 486; *Higgins v. Senior*, 8 M. & W. 834. See, also, *Pike v. Quigley*, 18 Q. B. D. 708; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Walker v. Christian*, 21 Grat. (Va.) 291.

The agent may, however, prove as an equitable defense an express agreement that he was not to be liable, when by mistake the written contract fails to carry out such agreement. *Wake v. Harrop*, 1 H. & C. 202.

²⁰ *Pratt v. Beaupre*, 13 Minn. 187 (Gil. 177); *Deering v. Thom*, 29

Although parol evidence is not admissible to show that the person who appears to be is not bound, evidence of custom is sometimes admissible to show that the agent, notwithstanding that he contracted merely as such, is also personally liable. For this purpose evidence of custom or usage in the particular business, to the effect that an agent so contracting is also personally liable on the contract, may be admitted,²¹ provided the custom or usage is not inconsistent with the express terms of the contract.²²

Oral Contract.

When the contract is not reduced to writing, the question whether the agent contracted merely as agent or personally depends upon the intention of the parties, and is for the jury.²³ Where the principal is disclosed, and the agent is known to be acting as such, he cannot be made personally liable unless he agreed to be so.²⁴ The intention is to be ascertained from all the circumstances attending the transac-

Minn. 120, 12 N. W. 350; *Peterson v. Homan*, 44 Minn. 163, 46 N. W. 303, 20 Am. St. Rep. 564; *Rhone v. Powell*, 20 Colo. 41, 36 Pac. 899. Cf. *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227; *American Bonding & Trust Co. v. Takahashi*, 49 C. C. A. 267, 111 Fed. 125.

Where B. contracts "as assignee of A.," the contract so clearly expresses that he contracts in his representative capacity that parol evidence is inadmissible.—*Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925.

²¹ *Pike v. Ongley*, 18 Q. B. D. 708; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Baermister v. Fenton*, 1 C. & E. 121. See *Bowstead*, Dig. Ag. art. 111.

²² *Barrow v. Dyster*, 13 Q. B. D. 635.

²³ *Owen v. Gooch*, 2 Esp. 567; *Seaber v. Hawkes*, 5 M. & P. 549; *Long v. Millar*, 4 C. P. D. 450; *Steamship Bulgarian Co. v. Transportation Co.*, 135 Mass. 421; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Hovey v. Pitcher*, 13 Mo. 191; *Anderson v. Timberlake*, 114 Ala. 377, 22 South. 431, 62 Am. St. Rep. 105.

²⁴ *Owen v. Gooch*, 2 Esp. 567; *Ex p. Hartop*, 12 Ves. 352; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *Meeker v. Claghorn*, 44 N. Y. 352; *Foster v. Persch*, 68 N. Y. 400; *Covell v. Hart*, 14 Hun (N. Y.) 252; *Anderson v. Timberlake*, 114 Ala. 377, 22 South. 431, 62 Am. St. Rep. 105; *Bleau v. Wright*, 110 Mich. 183, 68 N. W. 115.

tion. Thus, if an agent verbally orders goods, he is personally liable unless the seller knows that he is contracting merely as agent;²⁵ but if he orders the goods in his principal's name he is not liable, unless he gives his personal credit.²⁶

So, where a broker sells goods by auction, and invoices them in his own name as seller, it is a question for the jury whether the invoice was intended to be the contract, and, if so, the broker is personally liable; but, if the invoice was not so intended, it is a question for the jury whether it was intended by the parties that the broker contracted personally.²⁷ So, when an agent buys at auction, and gives his own name, he is personally liable unless it is clearly proved that he did not intend to bind himself personally, and that the auctioneer so understood.²⁸

Principal Undisclosed or Unnamed.

As has already been explained, when an agent makes a contract without disclosing that he is acting for a principal he is personally liable, although the other party, if the contract is not under seal or negotiable, may, upon discovering the principal, resort to the principal, or hold the agent, as he may elect.²⁹ And the rule is the same when the name

²⁵ Seaber v. Hawkes, 5 M. & P. 549.

²⁶ Ex p. Hartop, 12 Ves. 352; Johnson v. Oglby, 3 P. Wm. 277; Owen v. Gooch, 2 Esp. 567.

²⁷ Jones v. Littledale, 6 Ad. & E. 496; Holding v. Elliott, 5 H. & N. 117.

²⁸ Williamson v. Barton, 7 H. & N. 899.

²⁹ Simon v. Motivos, 3 Burr. 1921; McComb v. Wright, 4 Johns. Ch. (N. Y.) 656; Royce v. Allen, 28 Vt. 234; Pierce v. Johnson, 34 Conn. 274; Beymer v. Bonsall, 79 Pa. 298; York County Bank v. Stein, 24 Md. 447; Davenport v. Riley, 2 McCord (S. C.) 198; Wheeler v. Reed, 36 Ill. 82; McClellan v. Parker, 27 Mo. 162; Brigham v. Herrick, 173 Mass. 460, 53 N. E. 906; Mitchell v. Beck, 88 Mich. 342, 50 N. W. 805; Lull v. Bank, 110 Iowa, 537, 81 N. W. 784; Mackey v. Briggs, 16 Colo. 143, 28 Pac. 131.

Where C. conducted a business in the name of "C. & Co.," and in that name employed plaintiff, without disclosing the fact that he was agent for another, he cannot avoid personal liability on the ground

of the principal, but not the fact of the agency, is undisclosed;⁸⁰ although it is, of course, possible for the agent to exonerate himself by the terms of the contract.⁸¹ When the contract is in writing the liability of the agent thereon is a question of construction, and if he contracts in his own name he is necessarily liable.⁸² When the contract is oral, however, it does not follow from the mere fact that the agent fails himself to disclose the agency that he is bound. By failing to disclose he assumes the risk of being bound;⁸³ but if the other party actually knows, although from some other source, that the agent is contracting as such, and he does not expressly bind himself, the principal only is bound.⁸⁴ When the other party discovers the undisclosed or unnamed principal, while he may elect to resort to him, he is not obliged to do so.⁸⁵ Entrance upon performance after such

that "C. & Co." consisted of his wife alone, and that he acted as her agent. *Amans v. Campbell*, 70 Minn. 493, 73 N. W. 506, 68 Am. St. Rep. 547. Ante, p. 235.

⁸⁰ *Thomson v. Davenport*, 9 B. & C. 78; *Jones v. Littledale*, 6 Ad. & E. 486; *Ye Seng Co. v. Corbitt* (D. C.) 9 Fed. 423; *Winsor v. Griggs*, 5 Cush. (Mass.) 210; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Argersinger v. Macnaughton*, 114 N. Y. 539, 21 N. E. 1022, 11 Am. St. Rep. 687; *McClure v. Trust Co.*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 158; *De Remer v. Brown*, 165 N. Y. 410, 59 N. E. 129; *Brown v. Ames*, 59 Minn. 476, 61 N. W. 448; ante, p. 236.

⁸¹ A broker sent a contract note: "Messrs. S.: I have this day sold by your order and for your account, to my principals. * * * [Signed] W. A. B." Held, in an action of goods sold and delivered, that he was not personally liable. *Southwell v. Bowditch*, 1 C. P. D. 374. In such case, however, the agent may be liable also where there is usage to that effect. Ante, p. 181.

⁸² Ante, p. 357.

⁸³ *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324; *Nixon v. Downey*, 49 Iowa, 166.

⁸⁴ *Chase v. Debolt*, 7 Ill. 371; *Warren v. Dickson*, 27 Ill. 115; *Boston & M. R. v. Whitcher*, 1 Allen (Mass.) 497; *Johnson v. Armstrong*, 83 Tex. 325, 18 S. W. 594, 29 Am. St. Rep. 648; *Sharp v. Swayne*, 1 Pennewill, 210, 40 Atl. 113. Cf. *Williamson v. Barton*, 7 H. & N. 899; *Worthington v. Cowles*, 112 Mass. 30.

⁸⁵ As to what constitutes election, ante, p. 238.

discovery does not discharge the agent;³⁶ nor does mere alteration of the charges upon the other party's books from the name of the agent to that of the principal, without notice or attempt to enforce the claim against the latter, show an election.³⁷

Giving Credit to Agent—When Agent Only Bound.

While, as a rule, every principal, whether disclosed or undisclosed, is bound by a contract made on his behalf, the parties may so contract that only the agent is bound. We have seen that when a contract is made on behalf of an undisclosed principal, and the other party, after discovery of the principal, has once elected to hold the agent, he is bound by his election, and cannot afterwards resort to the principal.³⁸ And so, when the agent enters into a contract on such terms that he is personally liable thereon, but the other party, knowing at the time who the principal is, elects to give exclusive credit to the agent, he is bound by the election, and cannot subsequently charge the principal. "If at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, dealing with him and him alone, then * * * the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other."³⁹ The question of election is one of fact.⁴⁰ The mere fact that the other party, with

³⁶ *Forney v. Shipp*, 49 N. C. 527; *Whiting v. Saunders*, 23 Misc. Rep. 332, 51 N. Y. Supp. 211.

³⁷ *Hutchinson v. Wheeler*, 3 Allen (Mass.) 577.

³⁸ Ante, p. 238.

³⁹ Per Lord Tenterden in *Thomson v. Davenport*, 9 B. & C. 78, citing *Addison v. Gandesqui*, 4 Taunt. 574, and *Paterson v. Gandesqui*, 15 East. 62.

⁴⁰ *Calder v. Dobell*, L. R. 6 C. P. 486; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314.

knowledge of the real principal, enters into a contract in writing which purports to be the personal contract of the agent seems not to be conclusive,⁴¹ although the contrary has been held.⁴² On the other hand, when a sale is made to one who is acting as agent for the purchaser, who is known to the vendor, and only the note or other personal obligation of the agent is taken in payment of the price, this makes a *prima facie* case that credit is given to the agent alone.⁴³

Foreign Principal.

According to the rule frequently declared in England, when an agent contracts in that country on behalf of a foreign principal he is presumed to contract personally, unless a contrary intention appears from the terms of the contract or from the surrounding circumstances.⁴⁴ "Where a foreign merchant has authorized English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to

⁴¹ *Calder v. Dobell*, L. R. 6 C. P. 486; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314. See *Moline Malleable Iron Co. v. Iron Co.*, 27 C. C. A. 442, 83 Fed. 66.

⁴² *Chandler v. Coe*, 54 N. H. 561.

⁴³ *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; *Henry Ames Packing & Provision Co. v. Tucker*, 8 Mo. App. 95; *Merrell v. Witherby*, 120 Ala. 418, 23 South. 994, 26 South. 974, 74 Am. St. Rep. 39. See, also, *Coleman v. Bank*, 53 N. Y. 388. Cf. *Atlas S. S. Co. v. Land Co.*, 42 C. C. A. 398, 102 Fed. 358.

⁴⁴ *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313; *Dramburg v. Pollizer*, 28 L. T. 470; *Hutton v. Bullock*, 9 Q. B. 572.

the foreigner.”⁴⁵ When the contract is in writing, however, and it clearly appears that the agent contracted for the principal and not as agent, it has been held that the agent is not bound.⁴⁶

In this country the existence of a usage or custom so ingrafted into the common law as to become a rule, and creating a presumption in all cases that the agent is exclusively liable, has been denied. The question in each case is to whom credit was in fact given, and when goods are sold to a home agent, or a contract is made with him, the fact that he acts for a foreign principal is merely evidence that the agent, and not the principal, is bound, and must be considered in connection with other facts entering into the question of credit.⁴⁷ When the contract is in writing, if the terms are clear and unambiguous, the contract must be deemed the final repository of the intention of the parties; and, if it is in form a contract by the principal only, the agent must be exonerated, without regard to the fact that the principal is resident in a foreign country.⁴⁸ Whatever weight the consideration that the principal is a resident of a foreign country

⁴⁵ Per Blackburn, J., in *Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313, citing dicta in *Addison v. Gandesqui*, 4 Taunt. 574, 580; *Paterson v. Gandesqui*, 15 East, 62; *Thomson v. Davenport*, 9 B. & C. 78, 87, 89; *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605.

⁴⁶ *Green v. Kopke*, 18 C. B. 549; *Gadd v. Houghton*, 1 Ex. D. 357; *Ogden v. Hall*, 40 L. T. (N. S.) 751; *Glover v. Langford* [1892] 8 Times Law R. 628.

In *Glover v. Langford*, *supra*, Charles, J., said: “In point of law there is no distinction as to the liability of an agent acting in behalf of an English or a foreign principal; it is always a question of fact.”

⁴⁷ *Oelricks v. Ford*, 23 How. (U. S.) 40, 16 L. Ed. 534; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Bray v. Kettell*, 1 Allen (Mass.) 80; *Barry v. Page*, 10 Gray (Mass.) 398; *Kaulback v. Churchill*, 59 N. H. 296; *Mauzy v. Ranger*, 38 La. Ann. 485, 58 Am. Rep. 197. Cf. *Rogers v. March*, 33 Me. 106.

⁴⁸ *Bray v. Kettell*, 1 Allen (Mass.) 80.

may have, it seems that a resident in another state stands upon the same footing as a home principal.⁴⁹

Public Agent.

The rule which prevails in respect to the contracts, even under seal, made by public agents, has already been stated. A public officer or agent is not liable upon a contract entered into by him on behalf of the government,⁵⁰ unless it clearly appears that he pledges his personal credit.⁵¹ It has been doubted, however, whether the distinction applicable to public agents applies to officers or agents of a town or other municipal corporation capable of contracting and liable to an action on its contracts.⁵²

When Professed Agent is Real Principal.

Inasmuch as the real principal, whether disclosed or undisclosed, is liable on a contract made on his behalf, it may be shown that a person who purports to contract as agent, either of an unnamed⁵³ or of a named principal,⁵⁴ was in

⁴⁹ *Vawter v. Baker*, 23 Ind. 63; *Barham v. Bell*, 112 N. C. 131, 16 S. E. 903.

⁵⁰ *Macheath v. Haldemund*, 1 T. R. 172; *Rice v. Chute*, 1 East, 579; *Parks v. Ross*, 11 How. (U. S.) 362, 13 L. Ed. 730; *Brown v. Austin*, 1 Mass. 208, 2 Am. Dec. 11; *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66; *Belknap v. Reinhart*, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621; *Walker v. Swartwout*, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; *Tutt v. Hobbs*, 17 Mo. 486; *Sparta School Tp. v. Mendell*, 138 Ind. 188, 37 N. E. 004. And see cases cited ante, p. 336.

⁵¹ *Clutterbuck v. Coffin*, 3 M. & G. 842; *Auty v. Hutchinson*, 6 C. B. 266.

⁵² *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Brown v. Bradlee*, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430; *City of Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453; *Hall v. Cockrell*, 28 Ala. 507.

⁵³ *Carr v. Jackson*, 21 L. J. Ex. 137; *Adams v. Hall*, 37 L. T. 70. See, also, *Patrick v. Bowman*, 149 U. S. 411, 13 Sup. Ct. 811, 37 L. Ed. 790.

⁵⁴ *Railton v. Hodgson*, 15 East, 67; *Isham v. Burgett*, 157 Mass. 546, 32 N. E. 907. See, also, *Jenkins v. Hutchinson*, 13 Q. B. 744. Contra, *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

fact acting on his own behalf, and is himself the real principal.

WHEN AGENT ACTS WITHOUT AUTHORITY—IMPLIED WARRANTY OF AUTHORITY.¹

91. When one person expressly or impliedly represents that he has authority to act on behalf of another, and a third person is induced thereby to enter into a contract with the professed agent, the latter is deemed to warrant that the representation is true, and is liable for any loss caused to such third person by breach of such implied warranty, even if he acted in good faith under a mistaken belief that he had such authority. Every person who professes to contract as agent is deemed to warrant that he is in fact authorized to make the contract. When any such representation is made fraudulently, the person injured may sue in tort for the deceit.

EXCEPTION 1: In some jurisdictions, when a person enters into an unauthorized contract in the name of another, he is held to be personally liable on the contract.

EXCEPTION 2: When a person who contracts as agent, acting in good faith, either stipulates that he shall not be responsible for any want of authority, or discloses all the facts known to him upon which his supposed authority rests, he is not deemed to represent that he is in fact duly authorized.

SAME—MEASURE OF DAMAGES FOR BREACH OF WARRANTY.

92. The measure of damages for breach of warranty of authority is the loss directly resulting as a natural and probable consequence of the breach. When a contract is repudiated by the person on whose behalf it is made, such loss is *prima facie* the amount which would have been recoverable against him thereon upon his refusal to perform had the contract been authorized. If the

§§ 91-92. ¹ Following substantially Bowstead, Dig. Ag. art. 115. 116.

contract would not have been enforceable against him, even if authorized, because the formalities required by law were not observed, there can be no recovery for breach of warranty of authority.

Unauthorized Contract—Liability of Professed Agent—Warranty of Authority.

When a person without authority makes a contract on behalf of another, the latter is not bound unless he ratifies the contract. If the professed agent contracts in his own name he is, of course, personally liable on the contract. If, however, he contracts in the name of the ostensible principal, the professed agent is not liable on the contract, because it does not purport to be his, and to hold him liable on it would be "to make a contract, not to construe it."² This rule is sustained by principle and authority, though there are some decisions which hold him liable on the contract.³ The remedy of the third person who contracts with the professed agent in reliance upon the authority which he asserts, but does not possess, must, therefore, be sought in some other form of action than an action on the contract.

If the agent fraudulently represents that he is authorized when he is not, he is, upon familiar principles, liable in an action of tort, for deceit; and this, whether the representa-

² *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Ballou v. Talbot*, 16 Mass. 401, 8 Am. Dec. 146; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Noyes v. Loring*, 55 Me. 408; *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468; *Sheffield v. Ladue*, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145; *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. 316, 83 Am. St. Rep. 616; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580.

³ *Roberts v. Button*, 14 Vt. 195; *Weare v. Gove*, 44 N. H. 196; and see *Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404; *Solomon v. Penoyar*, 89 Mich. 11, 50 N. W. 644; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144, and other early New York cases to the same effect, have been overruled. *White v. Madison*, 26 N. Y. 117; *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640.

tion of authority is express, or is merely implied from his assuming to act as one having authority.⁴ So long as he is aware of his want of authority, it is immaterial whether he makes the representation actually intending a fraud or merely in reckless disregard whether it be true or false. On the other hand, if he honestly but mistakenly believes that he has authority, he is not liable in an action of deceit.

The effect of the foregoing doctrines being to leave a person who enters into a contract with another as agent without remedy where the professed agent has acted under a mistaken belief that he has authority, as in the case of a supposed agent acting under a forged power of attorney, which he believes to be genuine, has led the courts to resort to the fiction of an implied contract or warranty of authority.⁵ "The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation which arises in such a case is well expressed by saying that a person, professing to contract as agent of another,

⁴ See *Pothill v. Walker*, 3 B. & Ad. 114; *Randell v. Trimen*, 18 C. B. 786; *Smout v. Ilbery*, 10 M. & W. 1; *May v. Telegraph Co.*, 112 Mass. 90; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Noyes v. Loring*, 55 Me. 408; *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Duncan v. Niles*, 32 Ill. 532.

⁵ *Collen v. Wright*, 8 El. & B. 647; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 C. P. 427; *Re National Coffee Palace Co.*, 24 Ch. D. 367; *Stuart v. Haight*, 9 T. L. R. 488; *Oliver v. Bank of England* [1902] 1 Ch. 210 (forged power); *Baltzen v. Nicolay*, 53 N. Y. 467; *White v. Madison*, 26 N. Y. 117; *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Lane v. Corr*, 156 Pa. 250, 25 Atl. 830; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178; *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340; *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. 456; *Id.*, 32 Minn. 107, 19 N. W. 729.

impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist."⁶ The implied undertaking or warranty of the agent extends as well to cases in which he exceeds his authority as to cases in which he has no authority at all. Nor is the rule confined to the case of one person inducing another to enter into a contract; for, if the professed agent induces the other to enter into any transaction which he would not have entered into but for the representation of authority, the rule applies.⁷

Same—Principal Incapable.

The want of authority may arise from a lack of legal capacity on the part of the principal. In such case it seems that the assuming agent is liable upon the implied warranty,⁸

⁶ Collen v. Wright, 8 El. & B. 647.

⁷ Plaintiff having entered into a binding contract with a company to accept its debenture stock in payment of a debt, defendant directors issued stock, which without their knowledge was an overissue. Held, that they were liable on an implied warranty that they had authority to issue valid stock. *Firbank's Ex'rs v. Humphreys*, 18 Q. B. D. 60.

Where a broker, believing himself authorized under a power of attorney which proved to be a forgery, procured the Bank of England to allow him to transfer consols, to its loss, a recovery against him was allowed. *Oliver v. Bank of England* [1902] 1 Ch. 610. See 16 Harv. L. Rev. 311.

⁸ Where directors of a company which had no power to accept bills accepted on its behalf, they were personally liable to a purchaser without notice, on an implied warranty of authority, the company's powers being defined by private act, and the representation held to be of fact, and not of law. *West London Com. Bank v. Kitson*, 13 Q. B. D. 360.

In *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178, it was held that the infancy of the principal was not a breach of the warranty of authority, unless the act of the professed agent was entirely without the infant's knowledge or consent, since the contract, if authorized, would be voidable, and not void.

unless the incapacity has occurred without his knowledge since his appointment,⁹ or the parties, being equally informed as to the facts, act under a mutual mistake of law.¹⁰

When Circumstances Negative Warranty.

If the contract is made on such terms that the agent stipulates that he shall not be responsible for any want of authority, no warranty of authority will be implied, at least in the absence of bad faith on his part. Thus, where a broker signed a charter party "per telegraphic authority," evidence was admitted to prove that when charters are entered into by brokers in accordance with telegraphic instructions it was usual to sign in that form, and that it was understood in the trade as negating the implication of a warranty by the charterer's agent, at all events, to a greater extent than warranting that he had a telegram which, if correct, authorized such a charter.¹¹ And if the agent, acting in good faith, discloses all the facts upon which his authority rests, no warranty of authority can be implied.¹² Thus, where the defendant, after the death of her husband, but before she was informed of the fact, ordered goods from the plaintiff, who had previously supplied her on the credit of the husband, and been paid for them by him, the husband to the knowledge of the plaintiff being resident abroad, it was held that she was not liable on an implied warranty, the continuance of the life of the principal being, under the

* "It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. * * * In my opinion, if a person who has been held out as agent assumes to act on behalf of a lunatic, * * * the pretended agent is liable to an action for misleading an innocent person." Per Brett, L. J., in *Drew v. Nunn*, 4 Q. B. D. 661.

¹⁰ *Jefts v. York*, 10 Cush. (Mass.) 392.

¹¹ *Lilly v. Smales* [1892] 1 Q. B. 456.

¹² *Smout v. Ilbery*, 10 M. & W. 1; *Hall v. Lauderdale*, 46 N. Y. 72; *Ware v. Morgan*, 67 Ala. 461; *Newman v. Sylvester*, 42 Ind. 106; *Michael v. Jones*, 84 Mo. 578; *Barry v. Pike*, 21 La. Ann. 221.

circumstances, a fact equally within the knowledge of both contracting parties, and there having been no failure on her part to state any fact within her knowledge relating to the continuance of the authority.¹³ In this case the authority of the agent turned upon a question of fact, namely, the continuance of the authority dependent upon the life of the principal. When the agent makes full disclosure of the facts constituting his authority, as where he shows to the other party the power of attorney or letter of instructions under which he acts, the question of his authority becomes a mere question of construction, or of law, and no warranty of the sufficiency of the authority can be implied.¹⁴

Measure of Damages.

The measure of damages for a breach of a warranty of authority is the loss directly resulting as a natural and probable consequence of the breach.¹⁵ The damages are to be arrived at by considering the difference in the position the plaintiff would have been in had the authority existed and the position he is actually in in consequence of the contract or transaction being unauthorized.¹⁶ When a contract made by the professed agent is repudiated, the measure of dam-

¹³ *Smout v. Ilbery*, 10 M. & W. 1.

¹⁴ *Beattie v. Ebury*, L. R. 7 Ch. 777, affirmed L. R. 7 H. L. 102 (cf. *West London Com. Bank v. Kitson*, 13 Q. B. D. 360); *McReavy v. Eshelman*, 4 Wash. St. 757, 31 Pac. 35.

"If the defect of authority arises from a want of legal capacity, and if the parties are under a mutual mistake of the law, and are both equally informed in regard to the facts, so that the lender is not misled by any word or act of the agent, he would have no legal remedy against the agent, not in assumpsit, for it is not his contract, nor in tort, for he is chargeable with no deceit." Per Shaw, C. J., in *Jefts v. York*, 10 Cush. (Mass.) 392. Cf. *Oliver v. Bank of England* [1902] 1 Ch. 610.

¹⁵ *Simons v. Patchett*, 7 El. & B. 568; *Spedding v. Nevill*, L. R. 4 C. P. 212; *Godwin v. Francis*, L. R. 5 C. P. 295; *Skaaraas v. Finnegan*, 32 Minn. 107, 19 N. W. 729.

¹⁶ Per Lord Esher in *Firbank's Ex'rs v. Humphreys*, 18 Q. B. D. 54.

ages is what the plaintiff has lost by losing the contract, or prima facie the damages which would have been recoverable against the principal, had the contract been authorized, upon his failure to perform it.¹⁷ Other damages, naturally resulting from the breach, may be recovered.¹⁸ Thus, when the plaintiff has incurred expense in prosecuting an action against the principal upon the contract, in which he has been defeated on the ground that the contract was unauthorized, he may also recover the costs of such action, at least if the agent has persisted in asserting his authority and the costs were justified.¹⁹ It follows that if the contract as made could not have been enforced against the principal, even if authorized, because of failure to observe formalities required by law, as in the case of a contract in which the requirements of the statute of frauds are not satisfied, there can be no recovery against the agent.²⁰

When No Principal in Existence.

It would seem that the same principles should govern where a person professes to contract in the name of an alleged principal, but no such principal is in existence. In such case, however, it has been declared that the professed agent is liable upon the contract. Thus, where a contract

¹⁷ Re National Coffee Palace Co., 24 Ch. D. 367; Meek v. Wend, 21 Q. B. D. 126; Simmons v. More, 100 N. Y. 140, 2 N. E. 640; Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340; Skaaraas v. Finnegan, 31 Minn. 48, 16 N. W. 456.

¹⁸ Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 846, 21 Am. St. Rep. 346; Skaaraas v. Finnegan, 32 Minn. 107, 19 N. W. 729.

¹⁹ Collen v. Wright, 8 E. & B. 647; Randell v. Trimen, 18 C. B. 786; Godwin v. Francis, L. R. 5 C. P. 295; White v. Madison, 26 N. Y. 117.

²⁰ Baltzen v. Nicolay, 53 N. Y. 467; Dung v. Parker, 52 N. Y. 496.

Where A. verbally contracted, without authority, to sell real estate to B., it was held that the latter had no remedy in equity against A. for breach of the warranty of authority on the ground of part performance. Warr v. Jones, 24 W. R. 695; Bowstead, Dig. Ag. art. 116.

was entered into by the promoters of a proposed corporation on its behalf, in which case, as we have seen, there can be no ratification, since to admit of ratification the contract must be made on behalf of some person in existence, it was held that the professed agents were bound. "Where a contract is signed," said Earle, C. J., "by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility."²¹ The statement as to the liability of a professed agent when no principal exists was hardly necessary to the decision, for the contract, which in terms described the corporation as "proposed," was construed as one in which the parties contemplated that the persons signing should be personally liable. And the existence of any rule which, by reason of there not being at the time any principal in existence who can be bound, can convert the position of a person signing the name of an alleged principal, without using language indicating an intention to be bound personally, into the position of a contracting party, has been doubted.²² There is, however, some authority for holding personally liable upon this ground a person who contracts professedly on behalf of a voluntary association,²³ which, being neither a corporation nor a partnership, is not a legal entity.²⁴

It is conceded that the rule, if it exists, does not apply where an agent contracts on behalf of a principal who without his knowledge has died since the authority was con-

²¹ *Kelner v. Baxter*, L. R. 2 C. P. 174.

²² *Hollman v. Pullin*, 1 Cababe & E. 254. See, also, *Jones v. Hope*, 8 T. L. R. 247; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

²³ *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436; *Reding v. Anderson*, 72 Iowa, 498, 34 N. W. 300; *Comfort v. Graham*, 87 Iowa, 205, 54 N. W. 242. See, also, *Learn v. Upstill*, 52 Neb. 271, 72 N. W. 213; *Codding v. Munson*, 52 Neb. 580, 72 N. W. 846, 66 Am. St. Rep. 524.

²⁴ *Ante*, p. 111.

ferred. In such case, if the agent was aware of the fact of his principal's death, it seems that he would be liable in deceit or upon an implied warranty of authority.²⁵

LIABILITY ON QUASI CONTRACT—MONEY RECEIVED IN GOOD FAITH.

93. Where money is paid by a third person to an agent for the use of his principal, under a mistake of fact, the agent is liable to repay the same; provided that the money is reclaimed before he has paid it over, or dealt to his detriment with his principal on the faith of the payment.

SAME—MONEY OBTAINED WRONGFULLY.

94. When money is obtained by an agent from a third person by extortion or fraud, or otherwise wrongfully, he is liable to repay the same, although before it is reclaimed he has paid it over to his principal.

Money Received in Good Faith.

While an agent who contracts as such for a disclosed principal is not as a rule liable personally upon the contract, he may be liable to repay money which has been paid to him as agent by a third person, in an action for money had and received to the plaintiff's use. Although the agent has acted in good faith, as where the money has been paid to him under a mistake of fact, he is nevertheless liable to repay it, provided the party who made the payment reclaims it before he has paid it over or otherwise dealt to his detriment with his principal on the faith of the payment;¹ but, if he has in

²⁵ *Smout v. Ilbery*, 10 M. & W. 1; *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212.

§§ 93-94. ¹ *Buller v. Harrison*, Cowp. 565; *Cox v. Prentice*, 3 M. & S. 344; *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Mowatt v. McLelan*, 1 Wend. (N. Y.) 173; *O'Connor v. Clopton*, 60 Miss. 349; *Smith v. Binder*, 75 Ill. 492; *Granger v. Hathaway*, 17 Mich. 500; *Shepard v. Sherin*, 43 Minn. 382, 45 N. W. 718.

Where one entitled to elect whether he will hold an agent or a

the meantime paid it over or so dealt with his principal, he is not liable.² "An agent," said Lord Ellenborough, "who receives money for his principal is liable as a principal so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it."³ Payment to another, on behalf of the principal on faith of the credit, is equivalent to payment to the principal;⁴ but merely crediting him with the amount is not.⁵ Notice need not be formal, but must be such as to apprise the agent of the facts and of the intention of the other party by reason thereof to reclaim the money.⁶ If the agent did not disclose his agency, and the other party dealt with him as principal, payment over to the real principal will be no defense.⁷

Such cases are to be distinguished from those in which the agent receives money as a stakeholder, as where an auctioneer receives a deposit, in which case he is liable to refund on default of the vendor, it being his duty to hold as stakeholder until the completion or rescission of the contract.⁸

It has been held that, when money is paid to an agent for

principal who holds money which he is *ex æquo et bono* entitled to receive makes such election, he renounces all remedies against the other party. *Enfaula Grocery Co. v. Bank*, 118 Ala. 408, 24 South. 889.

See *Bowstead*, Dig. Ag. art. 117.

² *Holland v. Russell*, 4 B. & S. 14; *United States v. Pinover* (D. C.) 3 Fed. 305; *Cabot v. Shaw*, 148 Mass. 459, 20 N. E. 99.

³ *Cox v. Prentice*, 3 M. & S. 344.

⁴ *Cabot v. Shaw*, 148 Mass. 459, 20 N. E. 99.

⁵ *Buller v. Harrison*, Cowp. 565; *Cox v. Prentice*, 3 M. & S. 344.

⁶ *Shepard v. Sherin*, 43 Minn. 382, 45 N. W. 718.

⁷ *Newall v. Tomlinson*, L. R. 6 C. P. 405; *Smith v. Kelly*, 43 Mich. 390, 5 N. W. 437. See, also, *United States v. Pinover* (D. C.) 3 Fed. 305, 309.

⁸ *Burrough v. Skinner*, 5 Burr. 2639; *Edwards v. Hodding*, 1 Marsh. 377; *Gray v. Gutteridge*, 3 C. & P. 40.

a consideration which fails, an action for its recovery must be against the principal.⁹

Money Obtained Wrongfully.

If the agent has obtained the money wrongfully, he is liable to repay it in any event, although he has paid it over to his principal or otherwise dealt with him to his detriment on the faith of the payment without notice or demand from the other party. Thus, he is so liable if he obtains the money by extortion or illegal exaction,¹⁰ or by fraud,¹¹ or under other circumstances which to his knowledge make it illegal for him to receive it.¹² Of course, if the wrong was that of the principal, and was not participated in or known by the agent, payment to the principal is a defense.¹³

MONEY RECEIVED FROM PRINCIPAL FOR THIRD PERSON.

95. When an agent is authorized to pay to a third person money in his hands, and expressly or impliedly promises such person to pay him, the agent is personally liable to such person for the amount so received.

An agent who is instructed by his principal to pay money in his hands to a third person does not come thereby under

⁹ *Ellis v. Goulton* [1893] 1 Q. B. 350; *Bleau v. Wright*, 110 Mich. 183, 68 N. W. 115.

¹⁰ *Snowdon v. Davis*, 1 Taunt. 359 (payment under terror of illegal distress); *Smith v. Sleaf*, 12 M. & W. 585 (withholding documents to obtain more money than is due); *Elliott v. Swartwout*, 10 Pet. (U. S.) 137, 9 L. Ed. 373; *United States v. Pinover* (D. C.) 3 Fed. 305, 309; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; *Frye v. Lockwood*, 4 Cow. (N. Y.) 454.

¹¹ *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89; *Hardy v. Express Co.* (Mass.) 65 N. E. 375.

¹² *Ex parte Edwards*, 18 Q. B. D. 747 (receiving money from debtor with notice of act of bankruptcy); *Sharland v. Mildon*, 5 Hare, 469; *Larkin v. Hapgood*, 56 Vt. 597 (money paid in fraud of insolvent law).

¹³ *Owen v. Cronk* [1895] 1 Q. B. 265.

any obligation to the person in whose favor the payment is directed. The authority may be revoked by the principal until it is executed or the agent has come under some binding engagement with the third person.¹ But, if the agent promises to pay the third person, the authority is no longer revocable,² and he becomes liable to him for the amount. In such case the money is deemed to be appropriated to the use of the promisee, who may maintain an action for money had and received to his use.³

LIABILITY FOR TORTS.

- 96. Where loss or injury is caused to a third person by the wrongful act or omission of an agent while acting on behalf of his principal, the agent is personally liable therefor, whether he is acting with the authority of the principal or not, to the same extent as if he were acting on his own behalf.¹**

SAME—NONFEASANCE.

- 97. An agent is not liable to a third person merely by reason of failure to perform a duty which he owes to his principal; but, if he enters upon the performance of any act, he is liable to a third person for any injury resulting from his failure to exercise such reasonable care in the manner of its performance as he owes to such person.**

¹ § 95. ¹ *Williams v. Everett*, 14 East, 582; *Baron v. Husband*, 4 B. & Ad. 611; *Malcolm v. Scott*, 5 Ex. 601.

² Ante, p. 163.

³ *Crowfoot v. Gurney*, 9 Bing. 372; *Robertson v. Fauntleroy*, 8 Moore, 10; *Walker v. Rostron*, 9 M. & W. 411; *Goodwin v. Bowden*, 54 Me. 424; *Wyman v. Smith*, 2 Sandf. (N. Y.) 331.

Where a bill drawn on an agent is payable out of a particular fund, and he promises the holder to pay when he receives money from his principal, he is liable to the holder if he subsequently receives the money. *Stevens v. Hill*, 5 Esp. 247.

§§ 96-97. ¹ Substantially as in *Bowstead*, Dig. Ag. art. 124.

In General—Misfeasance.

An agent is personally liable for his wrongful acts; nor does the fact that he commits an act under direction of his principal, who is also liable, relieve him.² "For the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for, although the commanders are trespassers, so also are the persons who did the fact."³ It is immaterial that the agent acted in the bona fide belief that the principal had a right to do the act.

Accordingly an agent is liable if he converts the goods of a third person to his principal's use.⁴ It is no defense that he acted in good faith and in the belief that the principal was the owner.⁵ The various cases in which an inno-

² *Bennett v. Bayes*, 5 H. & N. 391 (illegal distress); *Stevens v. Midland Counties Ry.*, 10 Ex. 352 (malicious prosecution); *Bennett v. Ives*, 30 Conn. 329; *Johnson v. Barber*, 5 Gilman, 425, 50 Am. Dec. 416; *Burnap v. Marsh*, 13 Ill. 535 (malicious prosecution); *Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885; *Josselyn v. McAllister*, 22 Mich. 300 (false imprisonment); *Wright v. Eaton*, 7 Wis. 595; *City of Duluth v. Mallett*, 43 Minn. 205, 45 N. W. 154.

³ *Sands v. Child*, 3 Lev. 351, 352.

⁴ *Perkins v. Smith*, 1 Wils. 328; *Cranch v. White*, 1 Bing. N. C. 414; *McPheters v. Page*, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772.

⁵ *Stevens v. Elwell*, 4 M. & S. 259; *Hollins v. Fowler*, L. R. 7 Q. B. 616, affirmed L. R. 7 H. L. 757; *Cochrane v. Rymill*, 4 L. T. (N. S.) 744 (auctioneer); *Coles v. Clark*, 3 Cush. (Mass.) 399; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495 (auctioneer); *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394; *Warder, Bushnell & Glessner Co. v. Harris*, 81 Iowa, 153, 46 N. W. 859; *Stevens v. Lovejoy* (Cal.) 27 Pac. 33.

But see *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; *Roach v. Turk*, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360; *Abernathy v. Wheeler*, 92 Ky. 320, 17 S. W. 858, 36 Am. St. Rep. 593.

It has even been held that an innocent agent is liable although the property sold was government bonds payable to bearer. *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581.

But see *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491.

cent agent may be liable for conversion have been formulated by a recent English writer as follows: ⁶ An agent who has control or possession of goods, even if he obtained the possession from the apparent owner and acted in good faith on his authority, is guilty of a conversion if he sells and delivers or otherwise assumes to transfer the possession and property in the goods without the authority of the true owner; ⁷ or refuses, without qualification, to deliver the goods to the true owner on demand; ⁸ or transfers the possession to his principal or any other person except the true owner, with notice of the claim of the true owner; ⁹ but an agent is not guilty of conversion who in good faith merely contracts on behalf of his principal to sell goods of which he has not possession or control; ¹⁰ or by the authority of the apparent owner, and without notice of the claim of the true owner, deals with the possession without assuming to deal with the property in the goods. ¹¹

"All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or servant of another." ¹² If an agent makes a false

⁶ Bowstead, Dig. Ag. art. 125 (substantially).

⁷ *Barker v. Furlong* [1891] 2 Ch. 172; *Consolidated Co. v. Curtis* [1892] 1 Q. B. 495. And see cases cited supra, p. 380, note 5.

⁸ *Alexander v. Southey*, 5 B. & Ald. 247; *Lee v. Bayes*, 18 C. B. 590; *Singer Mfg. Co. v. King*, 14 R. I. 511.

⁹ *Davis v. Artingstall*, 49 L. J. Ch. 609.

¹⁰ *Consolidated Co. v. Curtis* [1892] 1 Q. B. 495, 498.

¹¹ *National Merc. Bank v. Rymill*, 44 L. T. (N. S.) 767; *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555. In this last case the court said: "Whoever receives goods from one in actual, though illegal, possession thereof, and who restores the goods to such person, is not liable for a conversion by reason of having transported them. * * * And this is so, apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner. *Loring v. Mulcahy*, 3 Allen (Mass.) 575; *Metcalf v. McLaughlin*, 122 Mass. 84."

¹² *Cullen v. Thompson's Trustees*, 4 Macq. 424, 432. See, also, *Bulkeley v. Dunbar*, 1 Aust. 37.

representation because his principal directed him to do so, and in consequence, believing it to be true, the necessary mental element is, of course, lacking, and the agent is not liable,¹³ although the principal, if he knew the representation to be false, would be.¹⁴ If, however, the agent makes a representation knowing it to be false, or in reckless disregard whether it be true or false, he is liable.¹⁵ So, where an agent assists in the commission of a breach of trust, he is personally liable.¹⁶ An agent is liable in an action of deceit for a fraudulent representation of authority.¹⁷

Nonfeasance.

It is commonly said that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. It is obvious that an agent incurs no liability to third persons merely because of his failure to perform a duty which he owes to his principal. "His liability * * * is solely to his principal, there being no privity between him and such third persons."¹⁸ "A servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer."¹⁹ A person may become a wrongdoer, however, by wrongful neglect as well as by wrongful act—that is, by omitting to perform a duty which he owes to a third person—and in such case, non constat he is a deputy, an action lies against him for his wrongful neglect or default, not quatenus a deputy, but as a wrongdoer. Thus,

¹³ Jaggard, Torts, 286.

¹⁴ Ante, p. 295.

¹⁵ Swift v. Jewsbury, L. R. 9 Q. B. 301; Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25; Weber v. Weber, 47 Mich. 569, 11 N. W. 389; Clark v. Lovering, 37 Minn. 120, 33 N. W. 776; Hedin v. Institution, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628. See, also, Arnot v. Biscoe, 1 Ves. 95; Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Reed v. Peterson, 91 Ill. 288.

¹⁶ A. G. v. Corporation of Leicester, 7 Beav. 176.

¹⁷ Ante, p. 368.

¹⁸ Story, Ag. § 308.

¹⁹ Per Holt, C. J., in Lane v. Cotton, 12 Mod. 472.

an agent is not liable to a third person because he fails to carry out his contract with his principal, and the latter is the only person who can maintain an action against him for that nonfeasance;²⁰ but if he enters upon performance, and in doing some act fails to exercise such reasonable care as the nature of the act demands, to the injury of a third person, he is liable therefor.²¹ For example, where an agent employed to manage a tenement directed the city water to be let on, but failed to see that the pipes had been left in proper condition, and in consequence of a faucet being open and the sink clogged water overflowed to the injury of a tenant below, it was held that the agent was liable to the latter. "The defendant's omission to examine the state of the pipes," said the court, "was a nonfeasance. * * * As the facts are, the nonfeasance caused the act done to be a misfeasance. But from what did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance."²² And so, where the superintendent of a manufacturing establishment and other agents and servants of the corporation negligently placed a tackle block so that it fell and injured the plaintiff, it was held that they were liable. "If the agent once actually undertakes and enters upon the execution of a particular work," said Gray, C. J., "it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he cannot, by abandoning its execution midway and

²⁰ *Denny v. Manhattan Co.*, 2 Denio (N. Y.) 115; *Id.*, 5 Denio (N. Y.) 639; *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735; *Delaney v. Rochereau*, 84 La. Ann. 1123, 44 Am. Rep. 456; *Reid v. Humber*, 49 Ga. 207; *Feltus v. Swan*, 62 Miss. 415.

²¹ *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Phelps v. Wait*, 30 N. Y. 78; *Horner v. Lawrence*, 37 N. J. Law, 46; *Harriman v. Stowe*, 57 Mo. 93; *Lottman v. Barnett*, 62 Mo. 159; *Miller v. Staples*, 3 Colo. App. 93, 32 Pac. 81. See *Jaggard, Torts*, 286-291.

²² *Bell v. Josselyn*, *supra*. See, also, *Greenberg v. Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911.

leaving things in a dangerous condition, exempt himself from liability. * * * This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly. * * * The plaintiff's action is not founded on any contract. * * * The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby."²²

It must be remembered that it is only for neglect of a duty which is imposed upon him as a member of society that the agent is liable to third persons. Thus, where an agent is charged with the management of a house and with the duty of keeping it in repair, his duty is solely to his principal, and consequently he is not liable to a third person who is injured by accident caused by his failure in that regard.²⁴ It must be conceded, however, that there is a tendency to ignore this distinction in such cases, and to hold agents in charge of property to a peculiar responsibility.²⁵ And in a recent case an agent was held liable to a person injured by

²² *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

²⁴ *Delaney v. Rochereau*, 84 La. Ann. 1123, 44 Am. Rep. 456.

An agent in charge of a building who fails to make necessary repairs is not liable to a tenant injured by such failure. *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829.

An agent in charge of a plantation is not liable to the owner of an adjoining plantation for damage resulting from malicious neglect and refusal to keep open a drain which it was his duty as such agent to keep open. *Feltus v. Swan*, 62 Miss. 415.

An agent charged with the duty of superintending the erection on his principal's premises of a grand-stand for a foot-ball game was not liable to persons injured by his negligence in permitting a defective structure. *Van Antwerp v. Linton*, 89 Hun, 417, 35 N. Y. Supp. 318, affirmed 157 N. Y. 716, 53 N. E. 1133, following *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564.

²⁵ *Lough v. John Davis & Co.* (Wash.) 70 Pac. 491; *Mayer v. Building Co.*, 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88; *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308.

his failure to keep in repair premises of which he had been given control.²⁶

Subagents and Coagents.

An agent is not, as a rule, liable to third persons for loss or injury caused by the wrongful act or omission of a sub-agent or coagent, unless he authorized or participated therein.²⁷ In cases of libel, however, a stricter rule prevails, and the manager of a newspaper is equally liable with the proprietor or publisher for the publication of a libelous article, whether he knows of the publication or not, since it is his business to know.²⁸

²⁶ *Lough v. John Davis & Co.* (Wash.) 70 Pac. 491. See, also, *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504, and *Campbell v. Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, in which cases, however, the agent let premises in dangerous condition, promising to repair.

²⁷ *Stone v. Cartwright*, 6 T. R. 411; *Baer v. Stevenson*, 30 L. T. 117; *Cargill v. Brown*, 10 Ch. D. 502; *Weir v. Barnett*, 3 Ex. D. 238; *Brown v. Lent*, 20 Vt. 529.

²⁸ *Nevin v. Spieckemann* (Pa.) 4 Atl. 497; *Smith v. Utley*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620.

CHAPTER XIV.

LIABILITY OF THIRD PERSON TO AGENT.

- 98. Liability on Contract—Right of Agent to Sue.
- 99. Intervention by Principal.
- 100. Defenses.
- 101. When Professed Agent is Real Principal.
- 102. Liability for Money Had and Received.
- 103. Liability for Torts.

LIABILITY ON CONTRACT—RIGHT OF AGENT TO SUE.¹

98. An agent may sue in his own name on a contract made by him on behalf of his principal: (1) When he has contracted personally; and (2) when he has a special property in, or lien upon, the subject-matter of the contract.

SAME—INTERVENTION BY PRINCIPAL.

99. The right of the agent to sue ceases on the intervention of the principal, unless the agent has as against him a right of lien on the subject-matter of the contract, in which case the right of action of the agent has priority to that of the principal.

SAME—DEFENSES.

100. In an action by the agent, the defendant may avail himself of any defense which would be good—
(1) As against the plaintiff of record; or
(2) As against the principal.

EXCEPTION: If the agent has, as against the principal, a right of lien on the subject-matter of the contract, a settlement with the principal is not available as a defense to the prejudice of the agent's claim, unless the defendant was led to believe that the agent acquiesced therein.

§§ 98-100. ¹ Following substantially Bowstead, Dig. Ag. art. 119-121.

Contract in Name of Agent.

When a contract is made by an agent in his own name, he is bound thereby and has a corresponding right to sue thereon. The rules which determine whether a contract is to be deemed the contract of the principal or of the agent have already been considered.² If the contract is the contract of the agent, and is under seal³ or negotiable,⁴ he, and he only, can sue upon it. If the contract is the contract of the agent, and is not under seal or negotiable, the principal, although undisclosed,⁵ may sue upon it, and the agent, subject to the qualifications to be mentioned, may also sue.⁶ And although the principal be disclosed, if the agent contracts personally he may sue.⁷ The agent's promise is a sufficient consideration for an undertaking to him personally. It is immaterial that the beneficial interest is in the principal, and that the agent when he recovers will be bound to account to him. Thus, an agent who sells goods for an undisclosed principal may recover the price;⁸ or an agent who consigns goods, taking a bill of lading or otherwise contracting in his own name, may sue for nondelivery or other breach of the contract.⁹ "There is privity of contract," said Lord Ellenbor-

² Ante, p. 331 et seq.

⁴ Ante, p. 244.

³ Ante, p. 243.

⁵ Ante, p. 303.

⁶ *Joseph v. Knox*, 3 Camp. 320; *Gardner v. Davis*, 2 C. & P. 49; *Sims v. Bond*, 5 B. & Ad. 389, 393; *Colburn v. Phillips*, 13 Gray (Mass.) 64; *Alsop v. Caines*, 10 Johns. (N. Y.) 396; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359.

⁷ *Cooke v. Wilson*, 1 C. B. (N. S.) 153; *Albany & R. Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982; *Pelton v. Baker*, 158 Mass. 349, 33 N. E. 394; *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835; *Doe v. Thompson*, 22 N. H. 217; *Potts v. Rider*, 3 Ohio, 70, 17 Am. Dec. 581; *Tustin Fruit Assn. v. Fruit Co. (Cal.)* 53 Pac. 693.

⁸ *Gardner v. Davis*, 2 C. & P. 49; *Alsop v. Caines*, 10 Johns. (N. Y.) 396.

⁹ *Joseph v. Knox*, 3 Camp. 320; *Dunlop v. Lambert*, 6 Cl. & F. 600; *Blanchard v. Page*, 8 Gray (Mass.) 281; *Finn v. Railroad Corp.*, 112

ough, "established between these parties by means of the bill of lading. * * * To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable. * * * We cannot say to the shippers they have no interest in the goods and are not damnified by the breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."¹⁰ Even where the principal, with the acquiescence of the broker who had contracted in his own name to purchase goods, refused to have anything to do with them, the contract nevertheless remaining enforceable against them, it was held that the broker, having contracted personally, could recover damages against the seller for nondelivery.¹¹ When the agent has no beneficial interest in the contract, his right of action does not pass to his assignee in bankruptcy.¹²

The right of the agent to maintain an action is not abolished by the provision of the codes which provides that every action must be prosecuted in the name of "the real party in interest," since an exception is created in favor of "the trustee of an express trust," and "a person with whom, or in whose name, a contract is made for the benefit of another" is declared to be such trustee, within the meaning of the term.¹³

Mass. 524, 17 Am. Rep. 128; *Carter v. Railway Co.*, 111 Ga. 83, 36 S. E. 308, 50 L. R. A. 354.

Where an agent sent the proceeds of sale to the owner by express, he could maintain an action against the express company for loss of the money. *Snider v. Express Co.*, 77 Mo. 523.

¹⁰ *Joseph v. Knox*, 3 Camp. 320.

¹¹ *Short v. Spackman*, 2 B. & Ad. 962.

¹² *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 332.

¹³ *Considerant v. Brisbane*, 22 N. Y. 389; *Landwerlen v. Wheeler*, 106 Ind. 526, 5 N. E. 888; *Cremer v. Wimmer*, 40 Minn. 511, 42 N. W. 467; *Snider v. Express Co.*, 77 Mo. 523; *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099.

This rule is applicable in the federal courts held within the code states. *Albany & R. Iron & Steel Co. v. Lundberg*, 121 U. S. 451,

The agent's right of action, however, unless he has a special interest in the subject-matter, is subservient to the right of the principal, who may supersede the agent's right by suing in his own name or otherwise intervening.¹⁴ An assignment for the benefit of creditors on the part of the principal works a revocation of the agency and terminates the agent's right of action.¹⁵

When Agent has Interest in Subject-Matter.

The agent may have such a special interest in the subject-matter of the contract as to entitle him to sue in his own name.¹⁶ A factor¹⁷ or an auctioneer¹⁸ has a special property in the goods, and may hence sue in his own name. A broker, on the other hand, having no such special property, is not entitled to sue unless he contracts personally, or unless under the circumstances of the case he does in fact have such special property.¹⁹ If the agent has, as against his principal, a right of lien in the subject-matter, his right to sue on the contract has priority, during the existence of his claim, to that of the principal.²⁰

7 Sup. Ct. 958, 30 L. Ed. 982. Cf. *Ward v. Ryba*, 58 Kan. 741, 51 Pac. 223.

¹⁴ *Sadler v. Leigh*, 4 Camp. 195; *Morris v. Cleasby*, 1 M. & S. 576, 579. See *Dickinson v. Naul*, 4 B. & Ad. 638.

¹⁵ *Miller v. Bank*, 57 Minn. 319, 59 N. W. 309.

¹⁶ *Atkins v. Amber*, 2 Esp. 493; *Drinkwater v. Goodwin*, Cowp. 251.

¹⁷ *Drinkwater v. Goodwin*, Cowp. 251; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Groover v. Warfield*, 50 Ga. 644; *Graham v. Duckwall*, 8 Bush (Ky.) 12.

¹⁸ *Williams v. Millington*, 1 H. Bl. 81; *Wolfe v. Horne*, 2 Q. B. D. 355; *Hulse v. Young*, 16 Johns. (N. Y.) 1; *Minturn v. Main*, 7 N. Y. 220; *Beller v. Block*, 19 Ark. 566.

¹⁹ *Fairlie v. Fenton*, L. R. 5 Ex. 169; *White v. Chouteau*, 10 Barb. (N. Y.) 202; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

²⁰ *Drinkwater v. Goodwin*, Cowp. 251; *Bowstead*, Dig. Ag. art. 120. Cf. *Moline Malleable Iron Co. v. Iron Co.*, 27 C. C. A. 442, 83 Fed. 66.

Defenses in Action by Agent.

Since the right of the principal to sue is superior, the defendant may in a suit by the agent avail himself of any defense, in law or equity, which would have been good against the principal. Thus, a settlement with the principal is a good defense.²¹ Under the statute of set-offs it has been held that the defendant cannot set off a debt due from the principal;²² but the contrary has also been held.²³ If, on the other hand, the agent by reason of a lien, as against the principal, upon the subject-matter, has a superior right to sue, a settlement with the principal is not a defense when such settlement would prejudice the agent's claim,²⁴ unless the defendant was led by the terms or conditions of the contract, or by the conduct of the agent, to believe that the agent acquiesced in a settlement with the principal.²⁵

The defendant is also entitled to any defense which would be good against the plaintiff on the record, although it would not be good against the principal suing in his own name.²⁶ Thus, where an insurance broker sued on a policy effected in his name, payment to him by allowing him credit for premiums due from him to defendants, although it would not have constituted payment as between the insurers and the assured, was held a defense. "The plaintiff," said Denman, C. J., "though he sues as trustee of another, must, in a court of law, be treated in all respects as the party in the cause: if there is a defense against him, there is a defense against the cestui que trust who uses his name; and the plaintiff cannot

²¹ *Atkinson v. Cotesworth*, 3 B. & C. 647.

²² *Isberg v. Bowden*, 8 Ex. 852; *Alsop v. Caines*, 10 Johns. (N. Y.) 396.

²³ *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029; *Hayden v. Bank*, 29 Ill. App. 458.

²⁴ *Robinson v. Rutter*, 4 El. & B. 954.

²⁵ *Grice v. Kendrick*, L. R. 5 Q. B. 340.

²⁶ *Gibson v. Winter*, 5 B. & Ad. 96; *Holden v. Railroad Co.*, 73 Vt. 317, 50 Atl. 1096.

be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself."²⁷

Measure of Damages.

The measure of damages in a suit by the agent is the same as in a suit by the principal, since the plaintiff will hold the amount recovered in trust for the latter.²⁸

WHEN PROFESSED AGENT IS REAL PRINCIPAL.

- 101. When a person who contracts professedly as agent for a named principal is in fact the real principal, he may sue on the contract if performance, in whole or in part, has been accepted by the other party with knowledge that he is the real principal. When a person who contracts professedly as agent of an undisclosed principal is in fact the real principal, he may (perhaps) sue on the contract, although there has been no recognition of him in the character of principal by the other party.**

Where a contract is made by an agent in the name of his principal, as a rule the principal, and he only, may sue thereon. The agent is not a party to the contract, and consequently may not maintain an action.¹ And where one who professes to contract as agent of a named principal is in fact the real principal, it would seem that the same rule should apply, and that, the contract being expressly with another person, the person contracting as agent could not maintain an action in whatsoever character.² Where the character and credit of the person who is named as principal may reasonably be considered as a material ingredient in the contract, it is conceded that the professed agent cannot, at least when the other party has not recognized him as the real principal, show himself to be such and maintain an action;

²⁷ Gibson v. Winter, 5 B. & Ad. 96.

²⁸ Joseph v. Knox, 3 Camp. 320; United States Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519; Groover v. Warfield, 50 Ga. 644; Evrit v. Bancroft, 22 Ohio St. 172.

§ 101. ¹ Ante, p. 302.

² See Hollman v. Pullin, 1 Cab. & E. 254.

and it is probably true that in all executory contracts, unless part performance has been accepted with knowledge of the true principal, the rule is the same.³ On the other hand, it has been held that when the plaintiff, professedly as agent for a named principal, contracted in writing to sell goods, and the buyer, with notice that he was the real principal, accepted and paid for part of the goods, the plaintiff could maintain an action for nonacceptance of the residue.⁴

A distinction has been drawn between cases where the professed agent contracts as agent of a named and of an unnamed principal. In the latter case it has been held that since the other party cannot have contracted in reliance upon the unnamed principal personally the ostensible agent can sue upon the contract, although there has been no recognition of him by the other party as real principal.⁵ But where the

³ *Rayner v. Grote*, 15 M. & W. 359; *Schmaltz v. Avery*, 16 Q. B. 655, per Patterson, J.

It has been intimated, however, that the professed agent can sue, if before action he gives notice that he is the real principal. *Bickerton v. Burrell*, 5 M. & S. 383; *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; ante, p. 307.

⁴ *Rayner v. Grote*, 15 M. & W. 359; *Whiting v. William H. Crawford Co.*, 93 Md. 390, 49 Atl. 615.

⁵ *Schmaltz v. Avery*, 16 Q. B. 655.

In that case *Schmaltz & Co.* signed a charter party as "agents of the freighter," a clause being inserted limiting their liability in view of the "charter being concluded on behalf of another party." It was held that *Schmaltz & Co.*, who were themselves the freighters, might sue upon the contract. "The names of the supposed freighters not being inserted," said Patterson, J., "no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. * * * There is no contradiction of the charter party if the plaintiff can be considered as filling two characters, namely, those of agent and principal. A man cannot, in strict propriety of speech, be said to be agent to himself. Yet, in a contract of this description, we see no absurdity in saying that he might fill both characters; that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt that character of freighter if he chose. There is nothing in the argument that the plaintiff's responsibility is ex-

contract is within the statute of frauds, it has been held that a written contract in such form is not a sufficient memorandum, so as to entitle the professed agent to sue.⁶

LIABILITY FOR MONEY HAD AND RECEIVED.

102. When an agent pays money for his principal under a mistake of fact or for a consideration which fails, he may maintain an action for its recovery.

"Where a man pays money by his agent, which ought not to have been paid, either the agent or the principal may bring an action to recover it back. The agent may, from the authority of the principal, and the principal may, as proving it to have been paid by his agent."¹ Thus, the agent may recover money paid under an illegal contract, but in ignorance of the illegality;² or paid under inducement of fraud;³ or paid to a third person in exchange for a counterfeit bill, al-

pressly made to cease 'as soon as the cargo is shipped,' for that limitation plainly applies only to his character as agent; and being real principal, his responsibility would unquestionably continue after the cargo was shipped." See *Mechem*, Ag. § 760.

• Where a broker signed a contract note, professedly as agent for an undisclosed principal, acting in fact upon his own behalf, of which the other party was not aware, it was held that he could not sue on the contract, because there was no memorandum to satisfy the statute of frauds; and some of the judges laid down that he could not sue because the contract was not with him. *Sharman v. Brandt*, L. R. 6 Q. B. 720.

But where an agent signed a memorandum with the name of his principal, and the party sought to be charged, who had also signed, supposed he was contracting with the agent personally, and that the signature was his own name, it was held that the memorandum satisfied the statute; and that, if defendant sought to defend on the ground that his supposition was caused by fraud, the question was for the jury, and could not be assumed as a basis for a ruling that the contract was void. *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54.

§ 102. ¹ Per Lord Mansfield in *Stevenson v. Mortimer*, Cowp. 805.

² *Oom v. Bruce*, 12 East, 224.

³ *Holt v. Ely*, 1 E. & B. 795.

though there was no authority to exchange such money with such third person.⁴

LIABILITY FOR TORTS.

103. An agent who is in the possession of or has a special property in the goods of his principal may maintain an action against a third person for trespass or conversion.

The liability of third persons to the agent for torts is mainly confined to cases where his right of possession is invaded.¹ A factor or other agent who is in possession of the goods of his principal may maintain an action of trespass or trover² for injuries affecting his possession, and in case of conversion may recover the full value.³ If an agent has a special property, as a factor to whom goods have been consigned, it is not essential to his right of recovery that he be in actual possession when his right is invaded.⁴

An action lies on behalf of an employé against a person who maliciously and without justifiable cause induces his employer to discharge him.⁵

⁴ *Kent v. Bornstein*, 12 Allen (Mass.) 342.

⁵ § 103. ¹ Story, Ag. § 416.

An agent who sells on commission may recover for a libelous statement causing loss of sales. *Weiss v. Whittemore*, 28 Mich. 366.

² *Burton v. Hughes*, 2 Bing. 173, 176; *Moore v. Robinson*, 2 B. & Ad. 817; *Robinson v. Webb*, 11 Bush (Ky.) 464.

Actual possession, pure and simple, will sustain an action for trespass. *Jaggard*, Torts, 670; *Taylor v. Hayes*, 63 Vt. 475, 21 Atl. 610; *Laing v. Nelson*, 41 Minn. 521, 43 N. W. 476.

³ *Mechanics' & Traders' Bank v. Bank*, 60 N. Y. 40.

⁴ *Fowler v. Down*, 1 B. & P. 44, 47; *Rooth v. Willson*, 1 B. & Ald. 59; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Beyer v. Bush*, 50 Ala. 19.

⁵ *Moran v. Dunphy*, 177 Mass. 485, 50 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367.

PART IV

RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

CHAPTER XV.

DUTIES OF AGENT TO PRINCIPAL.

- 104. Duties of Agent to Principal—In General.
- 105. Duty to Obey Instructions.
- 106. Duty to Exercise Skill, Care, and Diligence.
- 107. Duty to Exercise Good Faith.
- 108. Duty to Account.

DUTIES OF AGENT TO PRINCIPAL—IN GENERAL.

104. It is the duty of the agent—
- (1) To obey instructions;
 - (2) To exercise skill, care, and diligence;
 - (3) To act in good faith; and
 - (4) To account.

The obligations of principal and agent are to a great extent determined by the contract of employment or the terms of the appointment. Their mutual undertakings may be express, but in most cases are to a greater or less extent to be implied from the nature and the circumstances of the particular agency. The peculiar obligations of some classes of agents, such as factors and brokers, are defined by usage. Certain duties, however, resting upon the parties, result from the very nature of the relation, and are common to all agencies, except so far as they may be modified by express agreement, or by the understanding of the parties to be implied from the particular circumstances. The duties of this character which rest upon the agent naturally fall under the four heads enumerated in the black-letter text.

Duty to Act in Person.

The duty of the agent to act in person has been considered in the chapter treating of delegation by the agent.

SAME—DUTY TO OBEY INSTRUCTIONS.

105. It is the duty of the agent to obey the instructions of his principal, and if he fails to do so he is liable in damages for any resulting loss; except—

EXCEPTIONS: (a) Where obedience would require him to perform an illegal or immoral act;

(b) Where a departure from instructions is justified by the occurrence of an unforeseen emergency, or performance has, without the default of the agent, become impossible.

(c) Where obedience would impair his security for advances made upon goods consigned to him for sale.

Duty to Obey Instructions.

Every agent is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken, expressly or by implication, to perform them. It is his first duty to pursue the terms of his authority and to adhere strictly to his instructions. The duty of the agent to obey the instructions given by the principal with reference to the agency is inherent in the very nature of the relation. His right to act at all in the capacity of agent comes solely from the authority of the principal, and, as between them, the authority is inseparable from the instructions. A voluntary deviation by the agent from his instructions is at his peril, and, subject to the exceptions afterwards stated,¹ renders him liable to the principal for any resulting loss,² unless the principal, with full knowledge of the facts, ratifies

§ 105. ¹ Post, p. 402 et seq.

² *Whitney v. Express Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Frothingham v. Everton*, 12 N. H. 239; *Fuller v. Ellis*, 39 Vt. 345. 94 Am. Dec. 327; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Blot v. Boiceau*, 3 N. Y. 73, 51 Am. Dec. 345; *Adams v. Robinson*, 65 Ala. 586; *Butts v. Phelps*, 79 Mo. 302.

his acts.³ It is no defense that the course pursued was reasonable or that it was intended for the benefit of the principal.⁴ Nor, if loss results, will the agent be heard to say that the deviation was immaterial, unless he can show that the deviation did not contribute to the loss.⁵

Same—Implied Instructions—Usage.

The instructions may be implied as well as express, for the intention of the principal may be manifested by the nature and objects of the transaction, or may be inferable from the previous course of dealing between the parties or from other circumstances.⁶ And when a trade usage or custom prevails, an intention on the part of the principal that it is to govern the manner of performance may often be implied. This implication will not prevail in the face of express instructions which are inconsistent with it.⁷ But in the absence of express instructions it is to be implied that the prin-

³ Ante, p. 86.

⁴ Butler v. Knight, L. R. 2 Ex. 109; Coker v. Roper, 125 Mass. 577; Rechtscherd v. Bank, 47 Mo. 181.

⁵ Wilson v. Wilson, 26 Pa. 393; Walker v. Walker, 5 Helsk. (Tenn.) 425; Adams v. Robinson, 65 Ala. 586.

Where a principal directed his agent to remit by mail in bills of \$50 or \$100, and the agent remitted in bills of \$5, \$10, and \$20, which were never received, the agent was liable for the full amount. "It is not sufficient," said Lewis, C. J., "that the deviation was not material, if it appears that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task in a case like the present, but the defendant voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff." Wilson v. Wilson, *supra*.

⁶ Story, Ag. § 189. See, generally, chapter 7 as to construction of authority.

⁷ Robinson v. Mollett, L. R. 7 H. L. 802; Parsons v. Martin, 11 Gray (Mass.) 112; Douglass v. Leland, 1 Wend. (N. Y.) 490; Hutchings v. Ladd, 16 Mich. 493; Robinson Machine Works v. Vorse, 52 Iowa, 207, 2 N. W. 1108; United States Life Ins. Co. v. Advance Co., 80 Ill. 549; Franklin Ins. Co. v. Sears (C. C.) 21 Fed. 290; ante, p. 178.

principal intends the agent to act according to usage; and, even where the principal has given express instructions, they may be interpreted in the light of usage, so far as it is not in conflict with them.⁸ Thus, an agent instructed to collect or to sell must ordinarily collect or receive payment in cash, for such an intention on the part of the principal is to be implied;⁹ and if expressly instructed to collect in cash no usage will authorize him to disregard that instruction;¹⁰ but if not expressly instructed to that effect, and it is the usage of the particular business in which he is employed to accept a check in payment or to extend credit, he has implied authority so to do.¹¹

Liability for Disobedience—Measure of Damages.

Any failure on the part of the agent to obey the orders or to adhere to the instructions of his principal is a breach of duty which entitles the principal to recover at least nominal damages.¹² If the disobedience results in loss to the principal, he is entitled to recover substantial damages, meas-

⁸ *Balley v. Bensley*, 87 Ill. 556; post, p. 457.

⁹ An attorney in fact authorized to sell land "for such sum or price and on such terms as to him shall seem meet" is only authorized to sell for money; and, if he accepts in payment bonds which prove worthless, he is liable for the money he should have received. *Paul v. Grimm*, 165 Pa. 189, 30 Atl. 721, 44 Am. St. Rep. 648.

Where a bank which had received from a depositor a check for collection accepted in payment a cashier's check, which was not paid, owing to the subsequent insolvency of the drawer, it was liable to the depositor for the amount. *Fifth Nat. Bank v. Ashworth*, 123 Pa. 212, 16 Atl. 596, 2 L. R. A. 491.

¹⁰ *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Catlin v. Smith*, 24 Vt. 85; *Douglass v. Leland*, 1 Wend. (N. Y.) 490; *Barksdale v. Brown*, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720; *Hall v. Storrs*, 7 Wis. 253; *Wanless v. McCandless*, 38 Iowa, 20. But see *Clark v. Van Northwick*, 1 Pick. (Mass.) 343.

¹¹ *Russell v. Hankey*, 6 T. R. 12; *Farrar v. Lacy*, 21 Ch. D. 42. See, also, *Pope v. Westacott* [1894] 1 Q. B. 272.

¹² *Frothingham v. Everton*, 12 N. H. 239; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Adams v. Robinson*, 65 Ala. 586.

ured by the amount of the loss. It must, of course, appear that a loss has actually resulted from the breach. For example, there can be no recovery of substantial damages for failure to insure a ship, if the principal had no insurable interest, or if the ship, in the course of the voyage, has so deviated that the insurance, had it been effected, would have been rendered void.¹³ The loss must be the natural and proximate result of the disobedience, but it need not be the immediate result. Thus, where the loss is immediately caused by an accident or the wrongdoing of a third person, if the property or interest which is the subject of the instructions would not have been exposed to such risk but for the agent's disobedience, the loss is attributable to the disobedience as the proximate cause.¹⁴

Same—Illustrations.

The following cases will serve to illustrate the nature of the agent's duty to obey instructions and the extent of his liability for disobedience: If an agent is instructed to insure property, and neglects to do so, he is liable to the principal for its value in the event of its being lost.¹⁵ If an agent is instructed to sell shares when they reach a certain price, and fails to do so, he is liable for the difference between the value of the shares and the price which might have been so obtained.¹⁶ If an agent, being directed to warehouse goods at a certain place, warehouses them at a different place,¹⁷ or,

¹³ *Fourin v. Oswell*, 1 Camp. 359; *Alsop v. Colt*, 12 Mass. 40.

¹⁴ *Wilson v. Wilson*, 28 Pa. 393.

¹⁵ *De Tastett v. Crousillat*, 2 Wash. C. C. (U. S.) 132, Fed. Cas. No. 3,828; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Sawyer v. Mayhew*, 51 Me. 398.

So, if an agent of an insurance company fails to cancel a policy as directed, he is liable to the company for the amount it is compelled to pay thereon. *Franklin Ins. Co. v. Sears* (C. C.) 21 Fed. 290; *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513, 8 N. E. 348.

¹⁶ *Bertram v. Godfrey*, 1 Knapp, P. C. 381.

¹⁷ *Lilley v. Doubleday*, 1 Q. B. D. 510.

But where a factor neglected to sell cotton within a reasonable

being directed to ship goods by a designated carrier or at a certain time, ships by another carrier or at another time,¹⁸ and the goods are lost or destroyed while in the custody of the warehouseman or carrier, the agent is liable for their value. If an agent, being directed to forward a claim to a certain person for collection, sends it to another person, he thereby renders himself liable for any resulting loss.¹⁹ If an agent, being instructed to remit money by draft, sends the money in a letter, which is lost,²⁰ or, being instructed to send the money by express, remits by check, which becomes worthless by insolvency of the maker,²¹ the agent is liable for the loss. If an agent, being ordered to sell for cash, sells on credit or accepts a check or note in payment, he assumes responsibility for collection of the indebtedness.²² If an agent is authorized to sell goods for a certain price and sells for a less price,²³ or is authorized to sell goods in one lot and sells a part,²⁴ he is liable for the resulting loss.

time after being instructed to sell, and it was destroyed by fire, the delay was not the proximate cause of the loss. *Lehman v. Pritchett*, 84 Ala. 512, 4 South. 601.

¹⁸ *Wilts v. Morrell*, 66 Barb. (N. Y.) 511.

¹⁹ *Butts v. Phelps*, 79 Mo. 302.

²⁰ *Foster v. Preston*, 8 Cow. (N. Y.) 198; *Kerr v. Cotton*, 23 Tex. 411.

²¹ *Walker v. Walker*, 5 Helsk. (Tenn.) 425.

²² *Wiltshire v. Sims*, 1 Camp. 258; *Pope v. Westacott* [1894] 1 Q. B. 272; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Clark v. Roberts*, 26 Mich. 506; *Harlan v. Ely*, 66 Cal. 522, 9 Pac. 947. And see notes 9 and 10, *supra*.

²³ *Dufresne v. Hutchinson*, 3 Taunt. 117; *Sarjeant v. Blunt*, 10 Johns. (N. Y.) 74.

If the agent shows that at the time of sale and ever since the goods were worth no more than the price at which they were sold, the principal can recover only nominal damages. *Blot v. Bolceau*,

²⁴ *Levison v. Balfour* (C. C.) 34 Fed. 382.

Whether an order to buy 100 bales of cotton must be executed as a whole turns upon the meaning in which the order is to be understood in the light of the circumstances. *Johnston v. Kershaw*, L. R. 2 Ex. 82.

Same—Liability for Conversion.

If an agent parts with the possession of his principal's goods contrary to his instructions, he may be liable for conversion as well as in contract.²⁵ Thus, where an agent, who had received a note for negotiation with instructions not to let it go out of his reach without receiving the money, delivered it to another to get it discounted, who appropriated the avails, it was held that the agent was liable for conversion.²⁶ So, when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or to ship it to New York, and did not sell or ship on that day, but sold it on the next day at the price named, it was held that the sale was a conversion.²⁷ On the other hand, it is held that an agent is not liable in trover for selling goods at a price below instructions.²⁸ "The result of the authorities," said Savage, C. J.,²⁹ "is that, if the agent parts with the property in a way or for a purpose not authorized, he is liable for a

8 N. Y. 78, 51 Am. Dec. 345; *Frothingham v. Everton*, 12 N. H. 239; *Dalby v. Stearns*, 132 Mass. 230.

But in *Switzer v. Connett*, 11 Mo. 88, it was held that the agent is responsible to the principal for the price fixed. *Reynolds v. Rogers*, 63 Mo. 17.

The measure of damages in an action against a broker for selling stocks in violation of orders is the highest intermediate value between the sale and a reasonable time after the owner has received notice of it to enable him to replace the stocks. *Gallagher v. Jones*, 129 U. S. 192, 9 Sup. Ct. 335, 32 L. Ed. 658. See *Sedgwick*, Dam. § 822.

Where an agent converts money which he is directed to invest in a particular security, which subsequently acquires great value, he is accountable for the value of such article. *Short v. Skipwith*, 1 Brock. 103, Fed. Cas. No. 12,809.

²⁵ *Seyds v. Hay*, 4 T. R. 260; *Spencer v. Blackman*, 9 Wend. (N. Y.) 167; *Farrand v. Hurlbut*, 7 Minn. 477 (Gil. 383).

²⁶ *Lavery v. Snethen*, 68 N. Y. 523, 23 Am. Rep. 184.

²⁷ *Scott v. Rogers*, 31 N. Y. 676.

²⁸ *Dufresne v. Hutchinson*, 3 Taunt. 117; *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74.

²⁹ *Lavery v. Snethen*, 68 N. Y. 523, 23 Am. Rep. 184.

conversion, but if he parts with it in accordance with his authority, although at a less price, * * * he is not liable for a conversion of the property, but only in an action on the case for misconduct."

Gratuitous Agent.

A person who has undertaken gratuitously to perform an act on behalf of another is not bound to perform it, for his promise is without consideration. But, although he is not liable for nonfeasance, he is liable for misfeasance.³⁰ If he enters upon performance, he thereby impliedly undertakes and is bound to adhere to his instructions, and if he departs from them he is liable to the principal for any resulting loss.³¹

Justification for Failure to Obey Instructions—Emergency—Impossibility.

In cases of unforeseen emergency and extreme necessity the agent may be justified in departing from his instructions, upon the ground that the instructions are not applicable to the emergency, and that authority is to be implied to act, in the exercise of a sound discretion, as the occasion demands.³²

Thus, if goods are perishable, and are in immediate danger

³⁰ *Wilkinson v. Coverdale*, 1 Esp. 75; *Balfe v. West*, 13 C. B. 466; *Dartnall v. Howard*, 4 B. & C. 345; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Smedes v. Bank*, 20 Johns. (N. Y.) 372, 380; post, p. 410.

³¹ *Walker v. Smith*, 1 Wash. C. C. (U. S.) 152, Fed. Cas. No. 17,086; *Short v. Skipwith*, 1 Brock. (U. S.) 103, Fed. Cas. No. 12,809; *Williams v. Higgins*, 30 Md. 404; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470; *Ople v. Serrill*, 6 Watts & S. (Pa.) 264; *Spencer v. Towles*, 18 Mich. 9; *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33; *Lyon v. Tams*, 11 Ark. 189.

If a person undertakes, even gratuitously, to invest money for another, and disregards his instructions as to the specific character of the security, he is liable if the investment fails. *Williams v. Higgins*, *supra*.

³² *Forrestier v. Bordman*, 1 Story (U. S.) 43, Fed. Cas. No. 4,945; *Judson v. Sturges*, 5 Day (Conn.) 558; *Dusar v. Perit*, 4 Bin. (Pa.) 361; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Bernard v. Maury*, 20 Grat. (Va.) 434; *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am.

of deterioration, and a sale is necessary to prevent a total or a partial loss, and there is no opportunity to communicate with the principal, the agent may deviate from his instructions as to the time or price of sale.³³ So, an agent instructed to place funds or property in a certain place, if there is reasonable ground of apprehension for their safety if so deposited, may be justified in depositing them elsewhere.³⁴

A fortiori, if without the agent's fault performance become impossible, he will be excused for failure to comply with his instructions.³⁵

Same—Factor—Right to Sell for Advances.

Another exception exists in favor of a factor who has made advances. As a rule a factor, like any other agent, is bound to obey the orders of his principal; but if he has made advances on account of the consignment, by which he acquires a special property therein, he has a right, unless there is an agreement to the contrary, to sell so much of the goods as may be necessary to reimburse such advances without regard to instructions, provided the principal fails to repay the advances upon reasonable notice, and, if he is

Dec. 604; *Bartlett v. Sparkman*, 95 Mo. 136, 8 S. W. 406, 6 Am. St. Rep. 35; *Story*, Ag. § 193.

Where hay, which was sent during the war to New Orleans for sale, was seized by the military authorities of the United States, who refused to pay for it except in government certificates of indebtedness, which were worth only 93 per cent. of their face value, and the consignees, without communicating with the consignors, but according to the custom of factors there, accepted the certificates and afterwards sold them, it was held that their conduct was justified. *Greenleaf v. Moody*, supra.

³³ *Jarvis v. Hoyt*, 2 Hun (N. Y.) 637.

But, where a cargo of wheat sank in three feet of water, the agent, although authorized to employ means to save it, had no authority to sell it. *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604.

³⁴ *Drummond v. Wood*, 2 Calnes (N. Y.) 310.

³⁵ *Weakley v. Pearce*, 5 Helsk. (Tenn.) 401; *Greenleaf v. Moody*, 13 Allen (Mass.) 363. Cf. *Milbank v. Dennistoun*, 21 N. Y. 385.

directed to make a sale at a time or for a price which would impair his security, he may refuse to obey the instructions to sell.⁸⁶

Same—Illegal Act.

If the instructions require the agent to perform an illegal or immoral act, he is not liable for failure to perform it, for the very agreement to perform such an act is void.⁸⁷ Upon much the same principle, if an agent is employed to make a contract for his principal which would be void for illegality, the agent is not liable for failure to make the contract, since the principal could have acquired no rights under it, and consequently suffers no legal damage by the fact that it was not made.⁸⁸

Ambiguous Instructions.

If the instructions are ambiguous, so as to be susceptible of two meanings, and the agent complies with them according to his understanding of their meaning, he is not liable for failure to understand them as the principal intended and to act according to that understanding.⁸⁹

⁸⁶ *Brown v. McGran*, 14 Pet. (U. S.) 479, 10 L. Ed. 550; *Felld v. Farrington*, 10 Wall. (U. S.) 141, 19 L. Ed. 923; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Frothingham v. Everton*, 12 N. H. 239; *Marfield v. Goodhue*, 3 N. Y. 62; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Weed v. Adams*, 37 Conn. 378; *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663; *Lockett v. Baxter*, 3 Wash. T. 350, 19 Pac. 23.

Contra, *Smart v. Sandars*, 5 C. B. 895; *De Comas v. Prost*, 3 Moore, P. O. (N. S.) 158; ante, p. 223.

⁸⁷ *Brexell v. Christie*, Cowp. 395; *Webster v. De Taset*, 7 T. R. 157. See *Goodhue v. McClarty*, 3 La. Ann. 56.

⁸⁸ *Cohen v. Kittel*, 22 Q. B. D. 680; *Webster v. De Taset*, 7 T. R. 157.

⁸⁹ *De Tastett v. Crousillat*, 2 Wash. C. C. (U. S.) 132, Fed. Cas. No. 3,828; *Loraine v. Cartwright*, 3 Wash. C. C. (U. S.) 151, Fed. Cas. No. 8,500; *Courcier v. Ritter*, 4 Wash. C. C. (U. S.) 549, Fed. Cas. No. 3,282; *Pickett v. Pearsons*, 17 Vt. 470; *Bessent v. Harris*, 63 N. C. 542; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67, 21 N. W. 184; ante, p. 173.

SAME—DUTY TO EXERCISE SKILL, CARE, AND DILIGENCE.

106. It is the duty of the agent to exercise in the performance of the agency such skill, care, and diligence as the nature of his undertaking, to be inferred from all the circumstances of the case, reasonably demands, and if he fails to do so he is liable in damages for any resulting loss.

The duty of the agent to be skillful, careful, and diligent is closely connected with his duty to obey instructions. By accepting the appointment the agent impliedly undertakes that he will exercise reasonable skill, care, and diligence in the performance of the agency. As a rule, it may be said that, where an agent receives compensation for his services, that degree of skill, care, and diligence is required, and suffices, which is ordinarily exercised by persons of common capacity and prudence engaged in similar transactions.¹ It is obvious, however, that the degree of skill, care, and diligence which is reasonable, and for which the agent undertakes, is a question of fact, depending, not only upon the nature of the act to be performed, but upon all the circumstances of the case from which the mutual understanding of the parties and the undertaking of the agent are to be inferred, such as the instructions communicated, the usages of trade and the customs of the particular business, the previous course of dealing between the parties, and the degree of skill which the agent professes.² Thus, if the trans-

§ 106. ¹ *Varnum v. Martin*, 15 Pick. (Mass.) 440; *Holmes v. Peck*, 1 R. I. 242; *Gatther v. Myrick*, 9 Md. 118, 66 Am. Dec. 316; *Heinemann v. Heard*, 50 N. Y. 35; *Whitney v. Martine*, 88 N. Y. 535; *Wright v. Banking Co.*, 16 Ga. 38; *Steiner v. Clisby*, 103 Ala. 181, 15 South. 612; *Lake City Flouring-Mill Co. v. McVean*, 32 Minn. 301, 20 N. W. 233; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 653; *Isham v. Parker*, 3 Wash. St. 755, 29 Pac. 835.

² *Solomon v. Barker*, 2 F. & F. 726; *Stimpson v. Sprague*, 6 Greenl. (Me.) 470; *Wilson v. Russ*, 20 Me. 421; *Page v. Wells*, 37 Mich. 415; *Stevens v. Walker*, 55 Ill. 151; *Johnson v. Martin*, 11 La. Ann. 27, 66 Am. Dec. 193.

action is of a nature to require expert skill and knowledge, the agent impliedly undertakes, if there is nothing to indicate a different understanding, that he will exercise the skill and knowledge of an expert, and a decree of care and diligence based upon the skill and knowledge of an expert.³ On the other hand, if the agent is not and does not profess to be an expert, and the principal, knowing that fact, nevertheless sees fit to employ him, no undertaking to exercise the skill and knowledge of an expert can be implied, nor will the agent be held to a higher standard of performance than that upon which the principal has reason to rely.⁴ This subject will be further discussed in considering the duties in this respect of gratuitous agents, which, although often affected by the circumstance that such agents serve without reward, are to be determined by the application of the same principles.

It follows that, if the agent has exercised reasonable skill,

³ *Park v. Hamond*, 4 Camp. 344; *Godefroy v. Dalton*, 6 Bing. 460; *Lee v. Walker*, L. R. 7 O. P. 121; *Stanton v. Bell*, 9 N. C. 145, 11 Am. Dec. 744; *Varnum v. Martin*, 15 Pick. (Mass.) 440; *Stimpson v. Sprague*, 6 Greenl. (Me.) 470; *Orooker v. Hutchinson*, 1 Vt. 73; *Holmes v. Peck*, 1 R. I. 242; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388 (physician); *McFarland v. McClees* (Pa.) 5 Atl. 50.

A money lender by his business holds himself out as possessing competent skill to determine what reasonable care and prudence requires in lending for another. *McFarland v. McClees*, *supra*.

Where an insurance broker was informed that goods on which he was instructed to effect a policy were loaded at a prior port from that from which the risk was to commence, he was liable for effecting a policy in common form "beginning the adventure * * * from the loading," since such a policy attached only on goods loaded at the port which was the terminus a quo of the risk. "Insurance brokers are bound," said Gibbs, C. J., "to know that this is the law, and to act accordingly for the benefit of their employers. They are expected to display competent skill as well as diligence in their business." *Park v. Hamond*, *supra*.

⁴ *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Felt v. School Dist.*, 24 Vt. 297.

"A metropolitan standard is not to be applied to a rural bar." *Weeks*, *Attys.* § 289.

care, and diligence, he is not responsible for the consequences of his acts or omissions, although they result in loss which the exercise of a higher degree of these qualities might have prevented. He is not an insurer. If he has not been negligent, he is not liable for the loss of property by theft or fire.⁶ In matters left to his discretion, if he has acted in good faith and with reasonable care, he is not responsible for mere errors of judgment.⁶

Same—Liability for Negligence—Damages.

Substantially the same rules in respect to the damages recoverable by the principal are applicable in an action for negligence as in an action for failure to obey instructions.⁷ In other words, the measure of damages is the amount of the loss naturally and proximately resulting from the breach of duty.⁸

Same—Illustrations.

A consideration in detail of what constitutes negligence upon the part of different classes of agents, such as factors, brokers, and attorneys, would involve a fuller discussion of the peculiar duties imposed upon them by law or custom than is within the scope of this book. A few examples will be enough to illustrate the foregoing principles. An agent

⁶ Johnson v. Martin, 11 La. Ann. 27, 66 Am. Dec. 193; Furber v. Barnes, 32 Minn. 105, 19 N. W. 728.

⁶ Milbank v. Dennistoun, 21 N. Y. 386; McLaughlin v. Simpson, 8 Stew. & P. (Ala.) 85; Long v. Pool, 68 N. C. 479; Gettins v. Scudder, 71 Ill. 86; Stewart v. Parnell, 147 Pa. 523, 23 Atl. 838.

⁷ Ante, p. 898.

⁸ Whiteman v. Hawkins, 4 C. P. D. 13; Neilson v. James, 9 Q. B. D. 546; Cassaboglou v. Gibb, 9 Q. B. D. 220; Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. Ed. 606; Ashley v. Root, 4 Allen (Mass.) 504; Mobile Bank v. Huggins, 3 Ala. 206; Ryder v. Thayer, 3 La. Ann. 149.

An agent charged with the disbursement of funds is not liable for any loss occurring through his negligence, if the exercise of reasonable care by the principal would have prevented the loss. Sioux City & P. R. Co. v. Walker, 49 Iowa, 273.

instructed to insure must effect insurance within a reasonable time, or notify his principal of his inability to do so, and must use reasonable care in selecting a sufficient insurer and in securing a sufficient policy; and if he fails in his duty in this regard he is liable to the same extent as the underwriters would have been had the insurance been duly effected.⁹ An agent authorized to invest must use reasonable care in selecting adequate security.¹⁰ An agent authorized to sell on credit must use reasonable care to select a responsible purchaser.¹¹ An agent instructed to collect a claim must use reasonable diligence in demanding and enforcing payment, and is liable for the amount if by his neglect it is lost to the principal.¹² In the case of commercial paper, he must take all requisite steps to secure and preserve the rights of his principal against the various parties to the instrument, and must make due presentment for acceptance or payment, protest and give notice of dishonor, as the circumstances may require.¹³ After collection the agent must use reasonable diligence in remitting the proceeds.¹⁴ It is the duty of a factor to whom goods are consigned for sale without instruc-

* *Mallough v. Barber*, 4 Camp. 150; *Park v. Hamond*, 4 Camp. 344; *Turpin v. Bilton*, 5 M. & G. 455; *Maydew v. Forrester*, 5 Taunt. 615 (omitting to communicate material letter to underwriters); *De Tastett v. Crousillat*, 2 Wash. C. C. (U. S.) 132, Fed. Cas. No. 3,828; *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195.

¹⁰ *Whitney v. Martine*, 88 N. Y. 535; *Bank of Owensboro v. Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Bannon v. Warfield*, 42 Md. 22; *McFarland v. McClees* (Pa.) 5 Atl. 50.

¹¹ *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; *Phillips v. Moir*, 69 Ill. 155; *Frick & Co. v. Larned*, 50 Kan. 776, 82 Pac. 383.

¹² *Allen v. Suydham*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *First Nat. Bank v. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Reed v. Northrup*, 50 Mich. 442, 15 N. W. 543.

¹³ *Allen v. Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *First Nat. Bank v. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Chapman v. McCrea*, 63 Ind. 360.

¹⁴ *Morgan v. Richardson*, 13 Allen (Mass.) 410; *Buell v. Chaplin*, 99 Mass. 594, 97 Am. Dec. 58.

tions as to the time of sale or the price to exercise a reasonable discretion in the sale, and if he does so his duty is performed;¹⁵ but if he sells for a less price than he might with reasonable care and diligence have obtained,¹⁶ or if he fails to sell within a reasonable time and the price of the goods falls,¹⁷ he is liable for the loss.

The extent of the obligation imposed upon the agent by his duty to use reasonable skill is well illustrated by cases involving the responsibility of attorneys to their clients. An attorney is liable to his client for any loss resulting from failure to possess and to apply with reasonable care and diligence to the matter in hand a reasonable knowledge of the law. He is required to have at least as great knowledge as is ordinarily possessed by attorneys of good standing engaged in similar transactions.¹⁸ "On the other hand, he is not answerable for error in judgment upon points of new occurrence or nice or doubtful construction."¹⁹

¹⁵ *Marfield v. Goodhue*, 3 N. Y. 72; *Conway v. Lewis*, 120 Pa. 215, 13 Atl. 826, 6 Am. St. Rep. 700; *Given v. Lemoine*, 35 Mo. 110.

¹⁶ *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

¹⁷ *Atkinson v. Burton*, 4 Bush (Ky.) 299.

¹⁸ *Godefroy v. Dalton*, 6 Bing. 460; *Willson v. Russ*, 20 Me. 421; *Holmes v. Peck*, 1 R. I. 242; *O'Barr v. Alexander*, 37 Ga. 195; *Stevens v. Walker*, 55 Ill. 151; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655; *Isham v. Parker*, 3 Wash. St. 755, 29 Pac. 835; *Jamison v. Weaver*, 81 Iowa, 212, 46 N. W. 996.

"He is liable for the consequences of ignorance or nonobservance of the rules of practice of this court, for want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allowed to his department of the profession." *Godefroy v. Dalton*, *supra*, per Tindal, C. J.

¹⁹ *Godefroy v. Dalton*, 6 Bing. 460; *Montrion v. Jeffrys*, 2 C. & P. 113; *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213; *Citizens' Loan Fund & Savings Ass'n v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178, 22 L. Ed. 482. See *Barrows*, Neg. 371 et seq.

Gratuitous Agent.

Although a person who has without consideration promised to perform an act on behalf of another is not bound to perform it, yet if he enters upon performance he is bound to conform to the authority²⁰ and to exercise a certain degree of skill and care. Or, as it is usually put, he is not liable for nonfeasance, but he is liable for misfeasance. The ground of this liability is somewhat obscure.²¹ Where the principal delivers over to an agent something which is the subject of the agency, it is perhaps possible to find a consideration in the detriment which the principal suffers by parting with the control;²² but in many cases this element of consideration, if such it be, does not exist. It has sometimes been said that if the agent enters upon performance, the trust and confidence reposed is a sufficient consideration for his undertaking;²³ but, if trust and confidence were to be deemed a consideration, trust and confidence reposed would be a sufficient consideration for a promise to perform, and render the agent liable for nonfeasance. It must be admitted that the responsibility of the gratuitous agent arises independently of any consideration to support his undertaking. Nevertheless it seems that the trust and confidence reposed, although not to be regarded as a consideration, is the foundation of the agent's duty—a duty which the law imposes upon other persons besides agents if they see fit so to enter upon the performance of gratuitous undertakings.²⁴ "It is well settled," said Ames, J., in a case in which a landlord who

²⁰ Ante, p. 18.

²¹ See Anson, Contr. 333.

²² Coggs v. Bernard, 2 Ld. R. 909; Whitehead v. Greetham, 2 Bing. 464.

²³ Hammond v. Hussey, 51 N. H. 40, 12 Am. Rep. 41.

²⁴ Stanton v. Bell, 9 N. C. 145, 153, 11 Am. Dec. 744; Benden v. Manning, 2 N. H. 280; Philadelphia & Reading R. Co. v. Derby, 14 How. (U. S.) 468, 485, 14 L. Ed. 502; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548.

"And therefore when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action." Per Powell, J., in Coggs v. Bernard, 2 Ld. R. 909.

had gratuitously undertaken to make repairs was held liable for personal injuries to the tenant, resulting from failure to use ordinary care and skill in making them, "that, for an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him by the party relying on such promise and injured by the breach of it, although there was no consideration for the promise."²⁵ The scope of the agent's duty and the degree of skill and care demanded of him are to be measured by the nature and degree of the confidence and trust which, under the circumstances of the case, the principal is justified in reposing, or, in other words, by the degree of skill and care which the agent by reasonable implication undertakes to use.²⁶

It has from early times been laid down that a gratuitous agent,²⁷ or bailee,²⁸ is liable only for gross negligence. Yet it has not been questioned that the degree of skill and care demanded depends upon the circumstances of the particular case, and that failure to exercise the degree of skill and care demanded is actionable negligence.²⁹ Judges and writers

²⁵ Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548.

²⁶ See "Gratuitous Undertakings," by Joseph H. Beale, Jr., 5 Harv. L. R. 222.

²⁷ Shiells v. Blackburne, 1 H. Bl. 159; Stanton v. Bell, 9 N. C. 145, 11 Am. Dec. 744; Hammond v. Hussey, 51 N. H. 40, 12 Am. Rep. 41; Grant v. Ludlow, 8 Ohio St. 1; Eddy v. Livingston, 35 Mo. 487, 88 Am. Dec. 122; Lyon v. Tams, 11 Ark. 189; Stewart v. Butts, 45 Ill. App. 512.

²⁸ Coggs v. Bernard, 2 Ld. R. 909; Giblin v. McMullen, L. R. 2 P. C. 317; Tracy v. Wood, 3 Mason (U. S.) 132, Fed. Cas. No. 14,130; Foster v. Hank, 17 Mass. 479, 9 Am. Dec. 168; Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; Lampley v. Scott, 24 Miss. 528.

²⁹ See cases cited *supra*.

"Lawrence, being an agent acting without compensation, is liable only for gross negligence. To define what constitutes gross negligence, so as to render the phrase more intelligible or exact, is difficult, if not impossible, and all attempts to do so have, it would seem, heretofore failed. We are disposed to regard it as a question of fact,

to-day agree that the term "gross negligence" is misleading; gross negligence being, as declared by Rolfe, B., no more than negligence "with the addition of a vituperative epithet."³⁰ In this view, negligence is simply failure to exercise that degree of skill and care which, under the circumstances,

to be determined by reference to all the circumstances of the case, including the subject-matter and objects of the agency, and the known character, qualifications, and relations of the parties." Per Brinkerhoff, J., in *Grant v. Ludlow*, 8 Ohio St. 1.

³⁰ *Wilson v. Brett*, 11 M. & W. 113. See, also, *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766.

As showing how the degree of care required is dependent upon the nature of the undertaking, see *Philadelphia & Reading R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. Ed. 502, involving the liability of a gratuitous carrier of passengers. "When carriers undertake," said Grier, J., "to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. * * * Any negligence in such cases may well deserve the epithet 'gross.'"

"In each case the negligence, whatever the epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate perhaps to call it simply negligence." *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627, per Bradley, J.

Similar views were expressed by Fuller, C. J., in *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, a case involving the liability of bank directors who serve without compensation. "In any view," he says, "the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account." A severer standard for bank directors was laid down in *Hun v. Cary*, 82 N. Y. 65, 71, 37 Am. Rep. 546, viz.: "The same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs." And see the dissenting opinion of Harlan, J., in *Briggs v. Spaulding*, *supra*. On the other hand, in *Swentzel v. Bank*, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718, it was held that a gratuitous bank director is amenable only for such gross negligence as amounts to fraud.

the agent undertakes to exercise.³¹ The fact that the agent is unremunerated is but one of the circumstances to be considered, with all the other circumstances, in determining the nature of his undertaking, and in very many cases the standard of performance undertaken by gratuitous agents is no less high than that undertaken by paid agents. Thus, if an agent professes skill, he must exercise skill, whether he is paid or unpaid. If he undertakes, although gratuitously, to perform an act within the line of his profession or business, the principal is justified in relying upon him to exercise such skill and care as is demanded by the ordinary standard of performance of his profession or business, and the agent consequently undertakes for that standard of performance.³² On the other hand, a profession of adequate skill is more readily to be inferred when the agent undertakes to serve for reward than when he consents to serve as a matter of favor; for the mere undertaking to serve for reward implies *prima facie* a profession that the services are worth the reward.³³

In every case an undertaking is to be implied that the agent will exercise whatever skill he possesses, for failure to do so would be failure to exercise even slight care.³⁴ So, too, the agent must use at least as great care as he takes in his own affairs;³⁵ but his habitual care, if inadequate, is not to be taken as the measure of his undertaking, unless

³¹ "The general principle that a mandatory is only liable for gross neglect implies strict fidelity on his part, and the exercise of such care and prudence as, with reference to the particular subject of the bailment and the circumstances of the particular case, may be requisite for the performance of his undertaking." *Colyar v. Taylor*, 1 Cold. (Tenn.) 372, 379; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452; 5 Harv. L. R. 222.

³² *Shiells v. Blackburne*, 1 H. Bl. 159; *Benden v. Manning*, 2 N. H. 289; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *McNevins v. Lowe*, 40 Ill. 209 (physician); *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766.

³³ *Ante*, p. 405.

³⁴ *Wilson v. Brett*, 11 M. & W. 113.

³⁵ *Shiells v. Blackburne*, 1 H. Bl. 159; *Beal v. South Devon Ry.*, 3 H. & C. 337, 342.

the principal from his prior knowledge is not justified in relying upon a higher degree of care.

Notwithstanding the disuse of the term "gross negligence" there is, in effect, little difference between the later and the earlier cases. Thus, in *Shiells v. Blackburn*,³⁶ decided in 1789, a general merchant undertook without reward to enter at the custom house for exportation a parcel of leather belonging to G., together with a parcel of his own. By agreement with G. he made one entry of both parcels, but by mistake entered them under a wrong denomination, in consequence of which the goods were seized. It was held that he was not liable for the loss. "If a man gratuitously undertakes," said Lord Loughborough, "to do a thing to the best of his skill, where his situation is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a shipbroker, or a clerk in the custom house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom house, such a mistake is not to be imputed to him as gross negligence." And in a recent case in New York,³⁷ where a banker held himself out as dealing in choice stocks, and promised his customers careful attention in all financial transactions, it was held that he was bound to exercise the skill and knowledge of a banker engaged in loaning money for himself and his customers, although his services were rendered without compensation. "It does not follow," said the court, "that the banker was freed from the obligation of such diligence as he had promised to those who dealt with him, or was at liberty to withhold from his agency the exercise of the

³⁶ 1 H. Bl. 159.

³⁷ *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766.

skill and knowledge which he held himself out to possess. Nothing, in general, is more unsatisfactory than attempts to define and formulate the different degrees of negligence; but, even where the neglect which charges the mandatory is described as 'gross,' it is still true that, if his situation or employment implies ordinary skill or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge."

SAME—DUTY TO ACT IN GOOD FAITH.

107. It is the duty of the agent to exercise good faith and loyalty toward the principal in the transaction of the business intrusted to him. This requires—

- (a) That he shall not assume any position in which his interests will be antagonistic to those of the principal. More specifically—**
 - (1) He cannot, without consent of the principal, act both as agent and as party in the same transaction;**
 - (2) He cannot, in a transaction requiring the exercise of discretion, act as agent for both parties without their consent;**
 - (3) He cannot acquire any interest in the subject-matter of the agency nor any rights adverse to the principal based on a violation of instructions, a neglect of duty, or an abuse of the confidence reposed in him;**
 - (4) He cannot, by direct or indirect means, make any profit from the agency except his compensation.**
- (b) That he shall not assert the adverse interests or title of third parties to defeat the rights of his principal.**
- (c) That he shall give notice to the principal of all facts relative to the business of the agency coming to his knowledge which may affect the principal's interests.**

In General.

The duty of the agent to exercise good faith results from the fiduciary character of the relation. Of necessity, the principal must repose confidence in the agent, and must rely upon his good faith and loyalty to the interest which is com-

mitted to him. The agent must therefore act solely in the interest of his employer, and not in his own interest, or in the interest of another. No person while acting as agent may enter into any transaction in which he has any personal interest, or take a position in conflict with the interest of his principal, unless the principal, with full knowledge of all the facts, consents.¹ Whenever such a transaction is entered into in violation of this principle, the principal, when the facts come to his knowledge, may repudiate the transaction, or may adopt it and claim an account of the profit made by the agent.²

Acting as Agent and Party.

It is a breach of the confidence upon which the relation rests for the agent to unite the inconsistent relations of agent and party in the same transaction. When the agent assumes to deal with himself in a matter in which he is expected to deal with third persons, his own interest and that of his principal are necessarily antagonistic; and the principal may repudiate the transaction irrespective of whether or not it has resulted in loss and without regard to its bona fides.³ An agent employed to buy may not buy from himself,⁴ nor may

§ 107. ¹ *Gillett v. Peppercorn*, 8 Beav. 78; *Michoud v. Girod*, 4 How. (U. S.) 503, 555, 11 L. Ed. 1076; *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; *Keighler v. Manufacturing Co.*, 12 Md. 383, 71 Am. Dec. 600; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

² See *Bowstead*, Dig. Ag. 102.

³ *Gillett v. Peppercorn*, 3 Beav. 78; *Aberdeen Ry. v. Blakie*, 2 Eq. R. 1281; *Michoud v. Girod*, 4 How. (U. S.) 503, 11 L. Ed. 1076; *New York Cent. Ins. Co. v. Insurance Co.*, 14 N. Y. 85; *Taussig v. Hart*, 58 N. Y. 425; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *People v. Board*, 11 Mich. 222; *Green v. Knoch*, 92 Mich. 26, 52 N. W. 80.

⁴ *Gillett v. Peppercorn*, 3 Beav. 78; *Bentley v. Craven*, 18 Beav. 75; *Bischoffsheim v. Baltzer* (C. C.) 20 Fed. 890; *Conkey v. Bond*, 36 N. Y. 427; *Disbrow v. Secor*, 58 Conn. 35, 18 Atl. 981; *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246; *Friesenhahn v. Bushnell*, 47 Minn. 443, 50 N. W. 597.

an agent to sell become the purchaser.⁵ Nor can evidence of custom be admitted to convert a broker employed to buy for his employer into a principal to sell to him, unless the employer knows and assents to the dealing on the footing of such custom.⁶ Nor will the agent be permitted to accomplish indirectly what he may not do directly, as by selling to a third person acting in his interest. Any person purchasing from the agent in the agent's interest, or with knowledge of his misconduct, stands in his shoes, and may be charged as trustee.⁷ The rule applies to all agents, public⁸ and private, and to all persons acting in a fiduciary capacity, such as trustees, executors, guardians, and the like.⁹

⁵ *Oliver v. Court*, Dan. 301; *Bentley v. Craven*, 18 Beav. 75; *Jeffries v. Wilester*, 2 Sawy. (U. S.) 135, Fed. Cas. No. 7,254; *Copeland v. Insurance Co.*, 6 Pick. (Mass.) 198; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Bain v. Brown*, 56 N. Y. 285; *Martin v. Moulton*, 8 N. H. 504; *Parker v. Vose*, 45 Me. 54; *Allen v. Doe*, 31 Ga. 544; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Euneau v. Rieger*, 105 Mo. 659, 16 S. W. 854; *Francis v. Kerker*, 85 Ill. 190; *Hodgson v. Raphael*, 105 Ga. 480, 30 S. E. 416; *Dana v. Trust Co.*, 99 Wis. 663, 75 N. W. 429.

The clerk of a broker employed to sell land, who has access to the correspondence with the seller, stands in such a relation of confidence to the latter that if he becomes the purchaser he is chargeable as trustee. *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192. See, also, *Hobday v. Peters*, 28 Beav. 349; *Poillon v. Martin*, 1 Sandf. Ch. (N. Y.) 509.

But if a sale to a third person is consummated the agency is so far terminated that the agent may agree to take the property from the purchaser and assume his obligations. *Robertson v. Chapman*, 152 U. S. 673, 11 Sup. Ct. 741, 38 L. Ed. 592.

⁶ *Robinson v. Mollett*, L. R. 7 H. L. 802. Cf. *De Bussche v. Alt*, 8 Ch. D. 286; *Butcher v. Krauth*, 14 Bush (Ky.) 713.

⁷ *Jones v. Hoyt*, 23 Conn. 157; *Martin v. Moulton*, 8 N. H. 504; *Hughes v. Washington*, 72 Ill. 84; *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781; *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159, 11 Am. St. Rep. 597; *Cole v. Iron Co.*, 59 Hun, 217, 13 N. Y. Supp. 851; *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

⁸ *People v. Board*, 11 Mich. 222.

⁹ *Eaton*, Eq. 321.

Same—Knowledge and Consent of Principal.

The law does not forbid dealings directly between principal and agent with respect to the subject-matter of the agency, but all such dealings are regarded with suspicion. When an agent enters into a contract with his principal he must make a full disclosure of all the material circumstances and of all the facts known to him relating to the subject-matter. If the principal seeks to impeach such a transaction, the burden of showing that no advantage was taken by the agent, and that it was entered into in good faith and after full disclosure, rests upon the agent.¹⁰ A transaction entered into by the agent in violation of his trust is, of course, capable of ratification; and if, after the principal has acquired full knowledge of the facts, he does not repudiate it within a reasonable time, ratification will be implied.¹¹

Acting as Agent for Both Parties.

The duty of the agent to act solely with a view to the interest of his employer forbids him, in any transaction where the interests of the parties are adverse, from acting as agent for both parties, at least without their consent. Thus, an agent employed to sell may not ordinarily act as agent of the buyer, since the duty which the agent owes to the seller to sell for the best price is inconsistent with his duty to the buyer to buy on the lowest terms. When the agent assumes antagonistic positions as agent for both, either may repudiate the transaction;¹² nor can the agent recover compensation

¹⁰ *McPherson v. Watt*, 3 App. Cas. 254; *Edwards v. Myrick*, 2 Hare, 60; *Dunne v. English*, L. R. 18 Eq. 524; *Keith v. Kellam* (C. C.) 35 Fed. 243; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Howell v. Ransom*, 11 Paige (N. Y.) 538; *Nesbit v. Lockman*, 34 N. Y. 167; *Fisher's Appeal*, 34 Pa. 29; *Uhlich v. Muhlke*, 61 Ill. 499; *Legendre v. Byrnes*, 44 N. J. Eq. 372, 14 Atl. 621; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

¹¹ *Marsh v. Whitmore*, 21 Wall. (U. S.) 178, 22 L. Ed. 482; *Hawley v. Cramer*, 4 Cow. (N. Y.) 730; ante, p. 68.

¹² *Hesse v. Briant*, 6 De G., M. & G. 628; *New York Cent. Ins. Co. v. Insurance Co.*, 14 N. Y. 85; *Utica Ins. Co. v. Insurance Co.*, 17

from either ¹³ unless both consent to the double agency.¹⁴ But if there is no conflict between the interests of the two principals, as where the terms of sale have been fixed by the seller, or are to be fixed by agreement between the parties, and the duty of the agent is solely to bring buyer and seller together, so that nothing is left to his discretion, he may act as agent for both.¹⁵

Barb. (N. Y.) 132; *Shirland v. Iron Works Co.*, 41 Wis. 162; *Fish v. Leser*, 69 Ill. 394; *Mercantile Mut. Ins. Co. v. Insurance Co.*, 8 Mo. App. 408.

An insurance agent who has been directed by his company to reduce a risk either by cancellation or reinsurance cannot reinsure in another company of which also he is agent, without its consent. *Empire State Ins. Co. v. Insurance Co.*, 138 N. Y. 446, 34 N. E. 200.

¹³ *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Bollman v. Loomis*, 41 Conn. 581; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Everhart v. Searle*, 71 Pa. 256; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 523; *Meyer v. Hanchett*, 39 Wis. 415; *Id.*, 43 Wis. 246; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385.

"By engaging with the second, he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first the full quantum of services contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer, who is ignorant of the first engagement. And, if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer." *Bell v. McConnell*, *supra*, per *McIlvaine, J.*

Evidence of custom to charge double commission is inadmissible. *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

¹⁴ *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 523, and cases there cited. *Contra*, *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Meyer v. Hanchett*, 43 Wis. 246 (*semble*).

¹⁵ *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416; *Mullen v. Keetzleb*, 7 Bush (Ky.) 253; *Orton v. Scofield*, 61 Wis. 382, 21 N. W. 261; *Collins v. Fowler*, 8 Mo. App. 588; *Nolte v. Hulbert*, 37 Ohio St. 445; *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276;

Acquiring Adverse Interest.

The agent may not acquire, without the consent of the principal, any interest in the subject-matter of the agency or any rights adverse to him based on a violation of instructions, a neglect of duty, or an abuse of the confidence reposed. Any property or interest so acquired the agent will hold as trustee for the principal, who upon such terms of reimbursement and remuneration as equity may demand may compel a transfer to himself, or who may compel an account of profits.

An agent employed to purchase property may not purchase in his own name or on his own behalf, and if he does so he will hold it as trustee.¹⁶ And although he uses his own funds, he may be compelled upon tender of the purchase price and his reasonable compensation to convey to his principal.¹⁷ So an agent employed to buy or to settle a claim will not be permitted, if he buys it in his own name, to hold it adversely to his principal, or to recover from him more than he actually paid.¹⁸

Where the property thus adversely acquired by the agent is real estate, to which he takes title in his own name, and which he pays for with his own money, it is a disputed ques-

Knauss v. Brewing Co., 142 N. Y. 70, 36 N. E. 867. But see **Webb v. Paxton**, 36 Minn. 532, 32 N. W. 749.

¹⁶ **Lees v. Nuttall**, 1 Russ. & M. 53, 2 Myl. & K. 819; **Jenkins v. Eldredge**, 3 Story (U. S.) 181, Fed. Cas. No. 7,206; **Baker v. Whiting**, 3 Sumn. (U. S.) 475, Fed. Cas. No. 787; **Parkist v. Alexander**, 1 Johns. Ch. (N. Y.) 394; **Sweet v. Jacocks**, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; **Torrey v. Bank**, 9 Paige (N. Y.) 649; **Church v. Sterling**, 16 Conn. 388; **Matthews v. Light**, 32 Me. 305; **Wellford v. Chancellor**, 5 Grat. (Va.) 39; **Winn v. Dillon**, 27 Miss. 494; **Firestone v. Firestone**, 49 Ala. 128; **Rhea v. Puryear**, 26 Ark. 344; **Barziza v. Story**, 39 Tex. 354; **Vallette v. Tedens**, 122 Ill. 607, 14 N. E. 52, 2 Am. St. Rep. 502.

¹⁷ **Rose v. Hayden**, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145; **Boswell v. Cunningham**, 32 Fla. 277, 13 South. 354, 21 L. R. A. 54.

¹⁸ **Reed v. Norris**, 2 Myl. & C. 361; **Smith v. Brotherline**, 62 Pa. 461; **Noyes v. Landon**, 59 Vt. 569, 10 Atl. 342.

tion whether if he denies the trust the principal can prove it by oral evidence. It has been declared that to permit the principal to compel the agent to convey the estate to him would be directly in the teeth of the statute of frauds,¹⁹ which requires declarations or creations of trusts in land to be proved by writing signed by the party who declares the trust,²⁰ and this doctrine has very generally prevailed.²¹ Many cases, however, hold, and it seems with the better reason, that, the trust arising from the previously established confidential relation, the agent may be charged as trustee as upon a trust arising by implication of law.²²

An agent may not use for his own benefit, and to the detriment of his principal, information obtained in the course of the agency. Thus, if an agent in the course of his employment discovers a defect in his principal's title, he may not use the information to acquire the title for himself;²³ or if he discovers the existence of an outstanding charge, which he purchases at a discount, he can enforce it only for the amount actually paid.²⁴ So, where a confidential clerk, prior to the expiration of his employer's lease, secretly obtained a lease for his own benefit, he was compelled to transfer it to his employer.²⁵

¹⁹ 2 Sugden, Vend. (9th Ed.) c. 15, § 2.

²⁰ 29 Car. II, c. 3, § 7.

²¹ *James v. Smith* [1891] 1 Ch. D. 384; *Botsford v. Burr*, 2 Johns. Ch. 406; *Barnard v. Jewett*, 97 Mass. 87; *Collins v. Sullivan*, 135 Mass. 461; *Burden v. Sheridan*, 36 Iowa, 125, 14 Am. Rep. 506; *Sandfoss v. Jones*, 35 Cal. 481.

²² *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145 (an elaborate discussion); *Boswell v. Cunningham*, 32 Fla. 277, 13 South. 354, 21 L. R. A. 54. See *Browne*, St. Frauds (5th Ed.) § 96.

²³ *Ringo v. Binns*, 10 Pet. (U. S.) 269, 9 L. Ed. 420; *Case v. Carroll*, 35 N. Y. 385; *Galbraith v. Elder*, 8 Watts (Pa.) 81; *Smith v. Brotherline*, 62 Pa. 461; *Cameron v. Lewis*, 56 Miss. 76. See, also, *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566.

²⁴ *Carter v. Palmer*, 8 Cl. & F. 657.

²⁵ *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Davis v. Hamilton*, 108 Ill. 89, 48 Am. Rep. 541.

Where a business manager secretly copied from his employer's or-

An agent may not found adverse rights against his principal upon any neglect of duty. Thus, an agent charged with the payment of taxes on land who neglects that duty cannot acquire a valid tax title, but his purchase will inure to the benefit of his principal,²⁶ and this although he has not been placed in funds to pay.²⁷ Nor can an agent take advantage of his negligence to acquire rights which would have been secured to his principal by the exercise of proper skill and care.²⁸

May Not Make a Profit.

Good faith demands that an agent shall not without the knowledge and consent of the principal make any profit out of the agency, beyond his stipulated compensation or a reasonable compensation, where none is fixed. All profits belong to the principal, and must be accounted for.²⁹ "Where

der book a list of names of customers, and after termination of the employment used the list in a similar business on his own account, he was liable in damages to his employer. *Robt v. Green* [1895] 2 Q. B. 1. See, also, *Merryweather v. Moore* [1892] 2 Ch. 518; *Lamb v. Evans* [1893] 2 Q. B. 1.

²⁶ *Matthews v. Light*, 32 Me. 305; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Krutz v. Fisher*, 9 Kan. 90; *Murdoch v. Milner*, 84 Mo. 96; *Collins v. Rainey*, 42 Ark. 531; *Gonzalla v. Bartelsman*, 143 Ill. 634, 32 N. E. 532; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Gelsing v. Beyl*, 80 Wis. 443, 50 N. W. 501.

²⁷ *Barton v. Moss*, 32 Ill. 50; *Bowman v. Officer*, 53 Iowa, 640, 6 N. W. 28; *McMahon v. McGraw*, 26 Wis. 614; *Fox v. Zimmermann*, 77 Wis. 414, 46 N. W. 533; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Page v. Webb* (Ky.) 5 S. W. 308.

²⁸ An attorney employed to attach, procure judgment, and levy the same on the land attached, is estopped from denying the validity of his work, to his own profit; and when such attachment and levy are defective, and he purchases the land, his title inures to the judgment creditor. A record that discloses such relation of attorney and client is notice to a subsequent purchaser from the attorney. *Briggs v. Hodgson*, 78 Me. 514, 7 Atl. 387.

²⁹ *Hinchman v. E. I. Co.*, 1 Ves. Jr. 298; *Morrison v. Thompson*, L. R. 9 Q. B. 480; *Parker v. McKenna*, L. R. 10 Ch. 96; *Jeffries v. Wlester*, 2 Sawy. (U. S.) 135, Fed. Cas. No. 7,254; *Northern P. R. Co.*

the profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct; and, where the profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit thereof."³⁰ It is immaterial that the agent contributed his own funds and incurred all the risk,³¹ and that the principal suffered no injury.³² Nor will any usage which permits the agent to appropriate profits of the agency be upheld.³³ Thus, if an agent employed to sell purchases for himself and resells at an advance, he must account for the advance.³⁴ So, if he is employed to sell at not less than a given price, and he sells for a higher price.³⁵ An agent instructed to buy at a given price must account for the profit if he obtains the property for less.³⁶ He must account for

v. Kindred (C. C.) 14 Fed. 77; *Warren v. Burt*, 7 C. C. A. 105, 58 Fed. 101; *Dutton v. Willner*, 52 N. Y. 312; *Bain v. Brown*, 56 N. Y. 285; *Dodd v. Wakeman*, 26 N. J. Eq. 484.

³⁰ *Story, Ag. § 207.*

³¹ *Dutton v. Willner*, 52 N. Y. 312. See *Williams v. Stevens*, L. R. 1 P. C. 352.

³² *Parker v. McKenna*, L. R. 10 Ch. 96.

³³ *Thompson v. Havelock*, 1 Camp. 527; *Diplock v. Blackburn*, 3 Camp. 43.

³⁴ *De Busshe v. Alt*, 8 Ch. D. 286.

³⁵ *Cutter v. Demmon*, 111 Mass. 474; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Bain v. Brown*, 56 N. Y. 285; *Merryman v. David*, 31 Ill. 404; *Love v. Hoss*, 62 Ind. 255; *Blanchard v. Jones*, 101 Ind. 542; *Kramer v. Winslow*, 154 Pa. 637, 25 Atl. 766.

An agent settling a claim for less than authorized must account for the difference. *Judevine v. Town of Hardwick*, 49 Vt. 180; *Hitchcock v. Watson*, 18 Ill. 289.

But if an agent commissioned to sell is authorized to retain all over a certain price, he need not refund the excess. *Anderson v. Welser*, 24 Iowa, 428. Cf. *Morgan v. Elford*, 4 Ch. D. 352.

An agent authorized to sell land and to keep all he might obtain above a specified sum was bound to inform his principal of facts afterwards discovered increasing the value of the land. *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

³⁶ *Kimber v. Barber*, L. R. 8 Ch. 56; *Northern P. R. Co. v. Kin-*

any commission, discount, or personal benefit received from a third person.³⁷ An agent who is employed to give his whole time to his principal must account for any compensation received for services rendered to another.³⁸

May not Deny Principal's Title.

The duty of loyalty forbids the agent as a rule to deny the title of his principal, or to set up the adverse title of a third person, to goods or money received by him from his principal or on his account.³⁹ He may, however, show that since the receipt of the property the principal has parted with the title,⁴⁰ or that he has himself been divested of possession by title paramount.⁴¹ If the goods were wrongfully

dred (C. C.) 14 Fed. 77; *Bunker v. Miles*, 30 Me. 431, 1 Am. Rep. 632; *Kanada v. North*, 14 Mo. 615; *Ely v. Hanford*, 65 Ill. 267; *National Bank of Rising Sun v. Seward*, 106 Ind. 264, 6 N. E. 635; *Keyes v. Bradley*, 73 Iowa, 589, 35 N. W. 656; *Crump v. Ingersoll*, 44 Minn. 84, 46 N. W. 141; *Duryea v. Vosburgh*, 138 N. Y. 621, 33 N. E. 932.

³⁷ *Turnbull v. Garden*, 20 L. T. 218; *Morrison v. Thompson*, L. R. 9 Q. B. 480; *Mayor of Salford v. Lever* [1891] 1 Q. B. 168 (bribe).

Otherwise of a mere gratuity. *Ætna Ins. Co. v. Church*, 21 Ohio St. 492.

³⁸ *Thompson v. Havelock*, 1 Camp. 527; *Gardner v. McCutcheon*, 4 Beav. 534; *Leach v. Railroad Co.*, 86 Mo. 27, 56 Am. Rep. 408.

One who uses in his own business property delivered to him for use in that of his employer is liable for the value of the use. *Stebbins v. Waterhouse*, 58 Conn. 370, 20 Atl. 480.

³⁹ *Zaluta v. Vincent*, 1 DeG., M. & G. 315; *Nicholson v. Knowles*, 5 Mad. 47; *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Hancock v. Gomez*, 58 Barb. (N. Y.) 490; *Von Hurter v. Spengeman*, 17 N. J. Eq. 185; *Hungerford v. Moore*, 65 Ala. 232; *Day v. Southwell*, 3 Wis. 657; *Witman v. Felton*, 28 Mo. 601.

⁴⁰ *Smith v. Hammond*, 6 Sim. 10; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Duncan v. Spear*, 11 Wend. (N. Y.) 56; *Roberts v. Noyes*, 76 Me. 590; *Snodgrass v. Butler*, 54 Miss. 45.

⁴¹ *Hardman v. Wilcox*, 9 Bing. 382; *Biddle v. Bond*, 6 B. & S. 225; *Hunt v. Maniere*, 11 Jur. (N. S.) 28; *Burton v. Wilkinson*, 18 Vt. 185, 46 Am. Dec. 145; *Robertson v. Woodward*, 3 Rich. Law (S. C.) 251; *Bliven v. Railroad Co.*, 36 N. Y. 403; *Western Transp. Co. v. Barber*, 56 N. Y. 544.

obtained by the principal, and are claimed by the true owner, the agent may set up the title of the latter in an action brought by the principal.⁴² And if money is obtained by the agent wrongfully, or is paid to him under a mistake of fact or for a consideration which fails, so that he is liable to repay it to the person from whom he obtained it, and he does so repay it, he may show the fact as a defense if called on by his principal to account.⁴³

If an agent has received money on behalf of his principal under an illegal contract, he must account for the money, and cannot set up illegality which the other party has waived;⁴⁴ nor, if he has received money from his principal for an illegal purpose, which is executed, can he refuse to refund to the principal on demand.⁴⁵

⁴² *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Biddle v. Bond*, 6 B. & S. 225 (although the agent has not yielded possession to the claimant).

But not if the agent had notice of the adverse claim when the goods were intrusted to him. *Ex parte Dixon*, 19 Ch. D. 86.

⁴³ *Bowstead*, Ag. 96.

Where an agent sold a horse and received the price, and the sale was rescinded for the agent's fraud and the price returned, he was not liable to the principal for the purchase money. *Murray v. Mann*, 2 Ex. 538.

Ante. p. 376.

⁴⁴ *Tenant v. Elliott*, 1 B. & P. 8; *Bridger v. Savage*, 15 Q. B. D. 363; *Baldwin v. Potter*, 46 Vt. 402; *Norton v. Blinn*, 39 Ohio St. 145; *Gilliam v. Brown*, 43 Miss. 641; *Brooks v. Martin*, 2 Wall. (U. S.) 70, 17 L. Ed. 732; *Dillman v. Hastings*, 144 U. S. 136, 12 Sup. Ct. 663, 36 L. Ed. 378 (usurious interest); *Snell v. Pells*, 113 Ill. 145. But see *Clark*, Contr. 493, note, and cases cited.

It is otherwise if the principal must found his action on an illegal contract. *Hunt v. Knickerbacker*, 5 Johns. 326; *Fales v. Mayberry*, 2 Gall. (U. S.) 560, Fed. Cas. No. 4,622; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. Rep. 667.

⁴⁵ *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Kiewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731.

Duty to Give Notice.

It is the duty of the agent to give notice of all facts coming to his knowledge which may make it necessary for the principal to take steps for his security, and failure to do so renders the agent liable for any resulting loss.⁴⁶ Thus, an agent employed to insure must notify his principal promptly if he is unable to effect insurance.⁴⁷ So, if the property intrusted to the agent is seized on legal process,⁴⁸ or if a person to whom he has sold becomes insolvent,⁴⁹ or if a note taken by him in payment for goods sold is not paid at maturity,⁵⁰ he must promptly apprise his principal.

SAME—DUTY TO ACCOUNT.

108. It is the duty of the agent to account to the principal for all money and property coming into his hands by virtue of the employment, including all profits resulting from his transactions, either as agent, or on his own account in breach of his duty as agent. His specific duties in this respect are—

- (a) To keep accurate accounts of all his transactions in the course of the agency, and to render his accounts whenever required by the terms of his employment or upon demand;**
- (b) To keep money and property of the principal separate from his own and from those of third persons;**
- (c) To pay or deliver to the principal all money or property of the principal coming into his hands as agent whenever required by the terms of the employment or upon demand.**

⁴⁶ *Harvey v. Turner*, 4 Rawle (Pa.) 222; *Arrott v. Brown*, 6 Whart. (Pa.) 7.

An agent authorized to sell property on specified prices and terms is bound, on learning that a more advantageous sale can be made, to communicate the facts to his principal. *Holmes v. Cathcart* (Minn.) 92 N. W. 956. See, also, *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

⁴⁷ Ante, p. 407.

⁴⁸ *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305.

⁴⁹ *Forrestier v. Bordman*, 1 Story (U. S.) 43, Fed. Cas. No. 4,945.

⁵⁰ *Harvey v. Turner*, 4 Rawle (Pa.) 222.

In General.

It is the duty of the agent to account to his principal for all money or property which comes into his hands as agent, and to pay or deliver to his principal all money or property of the principal in his hands pursuant to the express or implied understanding between them or on demand. He must account for all profits and benefits received, whether in violation of his duty or in the legitimate course of the agency.¹ These obligations require him to keep and render accurate accounts of his dealings as agent, and to keep the money and property of his principal separate from his own and that of third persons. He is liable to account only to his principal.² A subagent employed by an agent is liable to account only to the agent who is his principal,³ unless the agent was authorized to employ the subagent on behalf of the original principal directly as his agent, so that privity of contract was created between them.⁴

§ 108. ¹ Ante, p. 422.

² Pinto v. Santos, 5 Taunt. 447; Myler v. Fitzpatrick, 6 Madd. 860; Attorney General v. Chesterfield, 18 Beav. 576; Tripler v. Olcott, 3 Johns. Ch. (N. Y.) 473; Toland v. Murray, 18 Johns. (N. Y.) 24.

In case of joint principals, he cannot be compelled to account to them separately. Louisiana Board of Trustees for Blind v. Dupuy, 81 La. Ann. 305.

³ Robbins v. Fennell, 11 Q. B. 248; Stevens v. Babcock, 3 B. & Ad. 354; Sims v. Brittain, 1 N. & M. 594; New Zealand & A. L. Co. v. Watson, 7 Q. B. D. 374; Trafton v. U. S., 3 Story (U. S.) 646, Fed. Cas. No. 14,135; Pownall v. Bair, 78 Pa. 408; National Bank of the Republic v. Bank, 50 C. C. A. 443, 112 Fed. 726.

Defendant was clerk of an attorney employed to receive plaintiff's tithes, and with authority from and as agent for his master, who was absent, received moneys for tithes due plaintiff, but did not pay them over to his master, who never returned. Held, on the ground that there was no privity of contract between plaintiff and defendant, that an action for money had and received did not lie. Stevens v. Babcock, *supra*.

⁴ De Bussche v. Alt, 8 Ch. D. 286; Wilson v. Smith, 3 How. (U. S.) 763, 11 L. Ed. 820; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291;

Duty to Keep and Render Accounts.

The agent must keep accurate accounts of all his dealings and transactions in the course of the agency, as well of payments and disbursements as of receipts, and must be constantly ready to render his accounts and vouchers when demanded.⁶ Whether this requires the keeping of technical books of account must depend upon the nature of the business undertaken. Where an agent fails to keep and preserve accurate accounts, every unfavorable inference consistent with the established facts will be drawn against him.⁶

The duty to be ready with his account requires the agent to be ready to render it when demanded.⁷ Whether he is

Campbell v. Reeves, 3 Head (Tenn.) 226; Miller v. Bank, 30 Md. 392. See ante, p. 123 et seq.

Where a ship was consigned to an agent in China for sale, a minimum price being fixed, and the agent, with consent of the principal, employed A. to sell the ship, who, being unable to find a purchaser, bought her himself at the minimum price, and resold at a profit, it was held that priority of contract existed between the principal and A., and that he was liable to account for the profit. *De Bussche v. Alt*, supra.

⁶ *Pearse v. Green*, 1 Jac. & W. 135; *Clark v. Tipping*, 9 Beav. 284; *Turner v. Burkinshaw*, L. R. 2 Ch. 488; *Keighler v. Manufacturing Co.*, 12 Md. 383, 71 Am. Dec. 600; *Peterson v. Polgnard*, 8 B. Mon. (Ky.) 309; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Fred W. Wolf Co. v. Salem*, 33 Ill. App. 614; *Armour v. Gaffey*, 30 App. Div. 121, 51 N. Y. Supp. 846, affirmed 165 N. Y. 630, 59 N. E. 1118.

The agent cannot be compelled to produce his books and documents to an improper person appointed by the principal, such as a rival in business. *Dadswell v. Jacobs*, 34 Ch. D. 278.

⁷ *Gray v. Haig*, 20 Beav. 219; *Peterson v. Polgnard*, 8 B. Mon. (Ky.) 309. See, also, *Fordyce v. Peper* (C. C.) 16 Fed. 516; *Armour v. Gaffey*, 30 App. Div. 121, 51 N. Y. Supp. 846.

Where the principal knew that the agent was not competent to keep accounts, and by his conduct contributed to make accurate book-keeping impossible, and the agent claimed a balance, it being impossible to reach an accurate result from the accounts, the parties were left in statu quo. *Macaulay v. Elrod* (Ky.) 28 S. W. 782. Cf. *Robbins v. Robbins* (N. J. Ch.) 3 Atl. 264.

“It is the first duty of an agent * * * to be constantly ready

bound to render it without demand must depend upon the understanding of the parties, arising from special agreement or from the previous course of dealing between them, the usages or customs of the particular agency, or other circumstances.⁸ Thus, it is ordinarily the duty of a collection agent to remit upon collection, and this duty involves the duty of rendering an account at the same time.⁹ In the absence of agreement a factor should render his account upon demand,¹⁰ but it has been held that where a demand would be impracticable or highly inconvenient he should render his account within a reasonable time.¹¹

Duty to Keep Property Separate.

Necessarily incidental to the duty to account is the duty to keep the goods and money of the principal separate from his own or from those of other persons. If the agent mixes the principal's goods with his own, the burden is on him to identify his own; and if he fails to do so, or they are inseparable from the mass, the principal may take the whole.¹² If the agent mixes the principal's fund with his own, he is liable for so much as he cannot prove to be his own;¹³

with his accounts. But this must mean that the agent must be ready to render his accounts when they are demanded." *Turner v. Burkinshaw*, L. R. 2 Ch. 488, 491.

⁸ *Clark v. Moody*, 17 Mass. 145; *Eaton v. Welton*, 32 N. H. 352; *Leake v. Sutherland*, 25 Ark. 219.

⁹ *Post*, p. 431.

¹⁰ *Topham v. Braddick*, 1 Taunt. 572.

¹¹ *Clark v. Moody*, 17 Mass. 145; *Langley v. Sturtevant*, 7 Pick. (Mass.) 214; *Dodge v. Perkins*, 9 Pick. (Mass.) 368, 387; *Eaton v. Welton*, 32 N. H. 352.

¹² *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Yates v. Arden*, 5 Cranch, C. C. (U. S.) 526, Fed. Cas. No. 18,126; *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *First Nat. Bank v. Kilbourne*, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174.

¹³ *Central Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. 77.

It has been held that in the usual course of business a factor is not

and, if the mingled fund is lost by accident or otherwise or depreciates, the agent must make good the loss.¹⁴ Thus, an agent depositing money in bank, who deposits it in his own name, or without distinguishing it on the books of the bank as belonging to his principal, is responsible for the loss in the event of the failure of the bank.¹⁵ One holding moneys in trust cannot be allowed so to invest or deposit them that he may claim them as his own if the venture proves profitable, or shift the loss upon his principal if a loss occurs.¹⁶

Duty to Pay Over and Deliver.

A person who has received money or property as agent is bound not only to account for it, but to pay or deliver when requested.¹⁷ The time when the agent must pay over may of course be fixed by the contract of employment or by subsequent instructions, and like the time for rendering his accounts may be fixed by the implied understanding of

required to keep the proceeds of the sale of goods of different consignors separate, but that he may mingle them in a common mass, and with like funds of his own, he becoming simply a debtor to his principal for the balance due by his account. *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695. But see *Banning v. Bleakley*, 27 La. Ann. 257, 21 Am. Rep. 554.

¹⁴ *Pinckney v. Dunn*, 2 S. C. 314; *Marine Bank v. Rushmore*, 28 Ill. 463; *Massachusetts Life Ins. Co. v. Carpenter*, 2 Sweeney (N. Y.) 734. Cf. *Bartlett v. Hamilton*, 46 Me. 435.

¹⁵ *Massey v. Banner*, 1 Jac. & W. 241; *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; *Mason v. Whitthorne*, 2 Cold. (Tenn.) 242; *Norris v. Hero*, 22 La. Ann. 605.

The rule has been applied to an administrator depositing in his own name, though he had no other funds in the bank, and informed its officers that the funds were held in trust. *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708. See *Eaton*, Eq. 439.

¹⁶ *Wren v. Kelton*, 11 Ves. 377; *State v. Greensdale*, 106 Ind. 364. 6 N. E. 926, 55 Am. Rep. 753.

¹⁷ *Harsant v. Blaine*, 56 L. J. Q. B. 511; *Pearse v. Green*, 1 Jac. & W. 135.

the parties, arising from a previous course of dealing, the usages or customs of the particular agency, or other circumstances.¹⁸ Thus, it is ordinarily the duty of an agent employed merely to collect to remit within a reasonable time after receipt of the money, if no instructions in that particular have been given.¹⁹ But money received by an agent merely as a deposit or in a continuing trust is in the agent's hands to await the principal's orders, and there is no duty to pay it over until demand.²⁰

In accounting with his principal, the agent has in general a right to deduct the amount of his commissions, advances, and proper charges.²¹ It seems that he has no right

¹⁸ "Where the principal is advised from time to time by his agent of the sales as they are made, and again of the receipt of the moneys as they are paid thereon, and according to the understanding that exists between them, arising either from a special agreement or a previous course of dealing between them, or the established usage or custom, if there be any, regulating the same, the principal is to call on his agent or factor and receive his money, or to draw upon him for it, the latter may retain it until it is demanded. But where the factor or agent is bound, either by the agreement or previous course of dealing between them, or the usage of trade in regard thereto, to forward the money to his principal or employer, it is clearly his duty to do so as he shall receive it, though it may be only a part of what he expects, by the earliest opportunity; and no practice to the contrary will either justify or excuse his retaining it beyond such time, unless the sum shall be so small as not to justify the expense of forwarding it." *Brown v. Arrott, 6 Watts & S. (Pa.) 418.*

¹⁹ *Lillie v. Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360; Campbell v. Boggs, 48 Pa. 524; Merchants' Bank v. Rawls, 21 Ga. 289; Hawkins v. Walker, 4 Yerg. (Tenn.) 188; Cagwin v. Ball, 2 Ill. App. 70; Campbell v. Roe, 32 Neb. 345, 49 N. W. 452; Wiley v. Logan, 96 N. C. 510, 2 S. E. 598; Mast v. Easton, 33 Minn. 161, 22 N. W. 253.*

²⁰ *Burdick v. Garrick, L. R. 5 Ch. 233; Watson v. Bank, 3 Metc. (Mass.) 217, 41 Am. Dec. 500; Downes v. Bank, 6 Hill (N. Y.) 297; Baker v. Joseph, 16 Cal. 173; Zuck v. Culp, 59 Cal. 142; Starr v. Stiles (Ariz.) 19 Pac. 225.*

²¹ *Post, p. 463.*

to set off against his principal a debt due him in a matter not arising out of the agency. That he has no right to apply to his own purposes money which he has received to apply to a particular purpose is, of course, clear.²² And it has been held that an agent who collects a claim has no right to set off an antecedent debt.²³

Same—Necessity of Demand.

It is the general rule, though with some conflict of authority,²⁴ that no right of action accrues to the principal for money or property received by the agent which he has failed to pay over or deliver until proper demand has been made.²⁵ The right of action is based on the agent's breach of the duty to pay over the money or deliver the property, and

²² Tagg v. Bowman, 99 Pa. 376; Id., 108 Pa. 273, 56 Am. Rep. 204. See, also, Buchanan v. Findlay, 9 B. & C. 738.

²³ Shearman v. Morrison, 149 Pa. 386, 24 Atl. 313; Simpson v. Pinkerton, 10 Wkly. Notes Cas. (Pa.) 423; Russell v. Church, 65 Pa. 9.

But in Noble v. Leary, 37 Ind. 186, it was held that an attorney who had collected money could set off a note held by him and executed by the principal.

"The principle underlying * * * is that an agent or attorney who, by virtue of special authority, has received money, cannot, when sued by his principal, set off a debt due to himself in a matter not arising out of his agency. By accepting the special trust he waives the general right of set-off. Moreover, the debts, not being in the same right or capacity, lack the mutuality which is essential to the right of set-off." Sterrett, J., in Tagg v. Bowman, 108 Pa. 273.

²⁴ This conflict exists mainly with respect to certain classes of agents, and the question involved is whether they are, by the character of their duties, under obligation to remit or pay over within a reasonable time after receipt of the money.

²⁵ Topham v. Braddick, 1 Taunt. 572; Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; Ferris v. Paris, 10 Johns. (N. Y.) 285; Cooley v. Betts, 24 Wend. (N. Y.) 203; Hall v. Peck, 10 Vt. 474; Hutchins v. Gilman, 9 N. H. 359; Waring v. Richardson, 33 N. C. 77; Bedell v. Janney, 9 Ill. 193; Cockrill v. Kirkpatrick, 9 Mo. 697; Jett v. Hempstead, 25 Ark. 462; Hammett v. Brown, 60 Ala. 408; Claypool v. Gish, 108 Ind. 424, 9 N. E. 382.

the rule assumes that there is no breach until demand has been made and compliance therewith neglected or refused. The duty may, of course, become fixed upon the agent by other circumstances, and in case of its breach the principal's right of action is complete without demand. Thus if by reason of the character of the agency, the established usages of the business, or the circumstances of the particular case, it is the agent's duty to remit or pay over within a reasonable time after receipt of the money, his failure to do so renders him liable to an action without demand.²⁶ So, no demand is necessary where the agent has agreed,²⁷ or has been instructed,²⁸ to remit at a certain time, and has failed to do so. The agent may waive demand, and a waiver may be implied from the circumstances. Thus, where he denies the agency or the liability sought to be enforced,²⁹ his conduct amounts to a waiver of demand. Nor is any demand necessary where the agent has violated his duty to notify the principal of the receipt of the money within a reasonable time,³⁰ or where he has converted it to his own use.³¹ It has also been held that, in cases where demand would be impracticable or highly inconvenient, the agent must account without demand, and that on this ground a foreign agent may be sued without a prior demand for an account-

²⁶ *Brown v. Arrott*, 6 Watts & S. (Pa.) 418. See cases cited, note 19, *supra*.

²⁷ *Haebler v. Luttgen*, 2 App. Div. 390, 37 N. Y. Supp. 794; *Mast v. Easton*, 33 Minn. 161, 22 N. W. 253.

²⁸ *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Clark v. Moody*, 17 Mass. 145.

²⁹ *Tillotson v. McCrillis*, 11 Vt. 477; *Hammett v. Brown*, 60 Ala. 498; *Wiley v. Logan*, 95 N. C. 358.

³⁰ *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Krause v. Dorrance*, 10 Pa. 462, 51 Am. Dec. 496; *Jett v. Hempstead*, 25 Ark. 462.

³¹ *Haas v. Damon*, 9 Iowa, 589; *Chapman v. Burt*, 77 Ill. 337; *Terrell v. Butterfield*, 92 Ind. 1; *Jackson v. Baker*, 1 Wash. C. C. (U. S.) 445, Fed. Cas. No. 7,130.

ing.³³ But on this point the authorities are not in harmony.³³

Same—Statute of Limitations.

What has been said relative to demand furnishes an answer to the question when the statute of limitations begins to run in favor of the agent. The statute runs only from demand and refusal, or from the time an account is rendered showing a balance in the principal's favor.³⁴ But if, from the character of the agency or other circumstances, it is the agent's duty to remit at once, as in case of a collecting agent,³⁵ the principal's right of action is complete, and the statute begins to run upon the expiration of a reasonable time from the receipt of the money by the agent.

Same—When Liable for Interest.

If the agent is not chargeable with any default or breach of duty, and is ready to pay when called upon by the principal, he is not liable for interest on moneys in his hands unless he has received, or has agreed to pay, interest.³⁶ If, however, he unreasonably neglects to give the principal no-

³³ *Clark v. Moody*, 17 Mass. 145; *Langley v. Sturtevant*, 7 Pick. (Mass.) 214; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Eaton v. Welton*, 32 N. H. 352.

³⁴ See *Topham v. Braddick*, 1 Taunt. 572; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Cooley v. Betts*, 24 Wend. (N. Y.) 203; *Green v. Williams*, 21 Kan. 64; *Coster v. Murray*, 5 Johns. Ch. (N. Y.) 522.

³⁵ *Topham v. Braddick*, 1 Taunt. 572; *Sawyer v. Tappan*, 14 N. H. 352; *Hart's Appeal*, 32 Conn. 520; *Waring v. Richardson* 33 N. C. 77; *Jayne v. Mickey*, 55 Pa. 260; *Judah v. Dyott*, 3 Blackf. (Ind.) 324, 25 Am. Dec. 112; *Jett v. Hempstead*, 25 Ark. 463; *Baker v. Joseph*, 16 Cal. 173; *Starr v. Stiles* (Ariz.) 19 Pac. 225; *Quinn v. Gross*, 24 Or. 147, 33 Pac. 535. But see *Sanford v. Lancaster*, 81 Me. 434, 17 Atl. 402.

³⁶ *Campbell v. Roe*, 32 Neb. 345, 49 N. W. 452. See cases cited, note 19, *supra*.

³⁷ *Wolfe v. Findlay*, 6 Hare, 66; *Mason v. Roosevelt*, 5 Johns. Ch. (N. Y.) 534; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Hyman v. Gray*, 49 N. C. 155; *Hauxhurst v. Hovey*, 26 Vt. 544.

tice of the receipt of the money³⁷ or improperly withholds money collected when it is his duty to pay it over,³⁸ or after demand in cases where he is entitled to demand,³⁹ such breach of duty renders him liable for interest from the time of such default. So, if he retains and applies to his own use the money of the principal, or otherwise deals with it improperly and in breach of his duty, he is chargeable with interest⁴⁰ at least while it is so employed.

Form of Action—Accounting in Equity.

For the enforcement of the agent's obligation to account the principal may resort to the usual legal remedies for breach of contract or for conversion or for the recovery of money due or of property wrongfully withheld.⁴¹ And in

³⁷ Dodge v. Perkins, 9 Pick. (Mass.) 368; Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

³⁸ Anderson v. State, 2 Ga. 370; Board of Justices v. Fennimore, 1 N. J. Law, 242; Bedell v. Janney, 9 Ill. 193.

³⁹ Pearse v. Green, 1 Jac. & W. 135; Harsant v. Blaine, 56 L. J. Q. B. 511; Hyman v. Gray, 49 N. C. 155; Wheeler v. Haskins, 41 Me. 432.

⁴⁰ Rogers v. Boehm, 2 Esp. 703; Brown v. Southhouse, 3 Bro. C. C. 107; Hinckley v. Railroad Co., 100 U. S. 153, 25 L. Ed. 591; Hill v. Hunt, 9 Gray (Mass.) 66; Schisler v. Null, 91 Mich. 321, 51 N. W. 900.

If an agent mixes the money of the principal with his own, and makes use of it, he is liable for interest on it from that time. Burdick v. Garrick, L. R. 5 Ch. 233; Miller v. Clark, 5 Lans. (N. Y.) 390; Blodgett's Estate v. Converse's Estate, 60 Vt. 410, 15 Atl. 109.

He must pay interest in case of fraud. Hardwick v. Vernon, 14 Ves. 504. And on secret profits, Benson v. Heathorn, 1 Y. & Coll. C. C. 326; Tyrrell v. Bank of London, 10 H. L. Cas. 26.

⁴¹ From his undertaking the agency, the law implies a promise on the agent's part to account for money received, and for breach of this promise assumpsit will lie. Harsant v. Blaine, 56 L. J. Q. B. 511; Clark v. Moody, 17 Mass. 145; Campbell v. Boggs, 48 Pa. 524; Floyd v. Day, 3 Mass. 403, 3 Am. Dec. 171; Seidel v. Peschkaw, 27 N. J. Law, 427.

An agent authorized to collect accounts and pay creditors of the principal out of the proceeds may be sued in assumpsit for money had and received, on his refusal to account for the balance. Tanner

many cases the principal has a right to have an account taken in a court of equity. This right depends upon the trust and confidence reposed in the agent, and it seems that it exists in all cases where there is a fiduciary relation between the parties, whereby it is the duty of the agent to keep an account of moneys received and to pay them over or account for them to the principal.⁴² It has, indeed, been frequently declared or held that the right to an accounting in equity does not exist where only a single transaction is involved,⁴³ but since the jurisdiction does not depend upon

v. Page, 106 Mich. 155, 63 N. W. 993. See, also, Liesemer v. Burg, 106 Mich. 124, 63 N. W. 999; Gottschalk v. Smith, 156 Ill. 377, 40 N. E. 937; Winningham v. Fancher, 52 Mo. App. 458; English v. Devarro, 5 Blackf. (Ind.) 588.

Where an agent authorized to sell land sells it for worthless bonds, he is liable in assumpsit for the amount he should have received. Paul v. Grimm, 165 Pa. 139, 30 Atl. 721, 44 Am. St. Rep. 648.

Where the agent refuses to account for the proceeds of goods sold, the principal may, at his election, sue for breach of contract or conversion of the goods. Ridder v. Whitlock, 12 How. Prac. (N. Y.) 208. See, also, Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438; Colt v. Stewart, 50 N. Y. 17; Michigan Carbon Works v. Schad, 49 Hun, 605, 1 N. Y. Supp. 490.

See, also, as to liability for conversion, ante, p. 401; Wells v. Collins, 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531; Greentree v. Rosenstock, 61 N. Y. 538; Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394; Kidder v. Biddle, 13 Ind. App. 653, 42 N. E. 293; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846.

As to when replevin will lie, see Terwilliger v. Beals, 6 Lans. (N. Y.) 403; Robinson v. Stewart, 97 Mich. 454, 56 N. W. 853; Stevenson v. Taylor, 2 Mich. N. P. 95.

⁴² Makepeace v. Rogers, 4 DeG., J. & S. 649; Marvin v. Brooks, 94 N. Y. 71; Thornton v. Thornton, 31 Grat. (Va.) 212; Vilwig v. Railroad Co., 79 Va. 449; Webb v. Fuller, 77 Me. 568, 1 Atl. 737; Ilges v. Dexter, 73 Ga. 362; Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645; Warren v. Holbrook, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554; Colonial & U. S. Mortg. Co. v. Mortgage Co. (C. C.) 44 Fed. 219. See, also, Padwick v. Stanley, 9 Harv. 627; Dunn v. Johnson, 115 N. C. 249, 20 S. E. 390.

⁴³ Phillips v. Phillips, 9 Hare, 474; Navulshaw v. Brownrigg, 2 DeG., M. & G. 441; Halsted v. Rabb, 8 Port. (Ala.) 65; Coquillard v. Suydam, 8 Blackf. (Ind.) 24.

the complication of accounts⁴⁴ this view is not to be supported, although the fact that the account is complicated is, of course, a distinct ground of equitable jurisdiction.⁴⁵ On the other hand, the bare relation of principal and agent, where the agent is not employed in a fiduciary capacity, is not enough to confer jurisdiction.⁴⁶

Del Credere Agent.

While, as a rule, an agent who has exercised due care and skill incurs no personal liability to his principal in respect to contracts entered into on his behalf, he may assume a personal liability by becoming a *del credere* agent. A *del credere* agent is a mercantile agent, usually a factor, who, in consideration of additional compensation, guaranties to his principal the payment of debts that become due through his agency.⁴⁷ As to the nature and extent of the obligation resting upon such agents there has been no little conflict. In England it was originally held that his obligation is absolute, making him liable in the first instance and in all events.⁴⁸ Later cases, however, have held that his obligation is secondary, and that he is merely a surety for the due performance of the person with whom he deals.⁴⁹ In this view, it would follow that his undertaking is a promise to answer for the debt or default of another within the fourth section of the statute of frauds,⁵⁰ yet more recently it has been held that his undertaking is not within the statute⁵¹

⁴⁴ But see *Powers v. Cray*, 7 Ga. 206; *Crothers v. Lee*, 29 Ala. 337.

⁴⁵ *Eaton*, Eq. 517.

⁴⁶ *Hemmings v. Pugh*, 4 Giff. 456.

A banker is not bound to account in equity to his customer, unless the accounts are complicated. *Foley v. Hill*, 1 Ph. 390.

⁴⁷ *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190.

⁴⁸ *Grove v. Dublois*, 1 T. R. 112; *Mackenzie v. Scott*, 6 Bro. P. C. 280; *Houghton v. Matthews*, 3 Bos. & P. 489. See *Bowstead*, Dig. Ag. 2.

⁴⁹ *Morris v. Cleasby*, 4 M. & S. 566. See, also, *Hornby v. Lacy*, 6 M. & S. 166.

⁵⁰ 20 Car. II, c. 3. *

⁵¹ *Coutourlier v. Hastie*, 8 Ex. 40; *Sutton v. Gray* [1894] 1 Q. B. 285.

—a position that can hardly be reconciled with the view that he is only secondarily liable.⁵³ In the United States the earlier view has prevailed, so that he may be charged in *indebitatus assumpsit* as for goods sold, and his undertaking is not within the statute of frauds.⁵⁴ In other respects he has the rights and duties of an ordinary agent. If he properly sells upon credit, he cannot be made accountable before the expiration of the credit.⁵⁵ Nor does the principal forego his rights against the third party, but he may forbid payment to the agent, and may maintain an action against the buyer for the price.⁵⁶

⁵³ See *Wickham v. Wickham*, 2 Kay & J. 487.

⁵⁴ *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; *Wolff v. Koppel*, 5 Hill (N. Y.) 458; *Id.*, 2 Denio (N. Y.) 308, 43 Am. Dec. 751; *Sherwood v. Stone*, 14 N. Y. 267; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190. *Contra*, *Thompson v. Perkins*, 3 Mason, C. C. (U. S.) 232, Fed. Cas. No. 13,972.

⁵⁵ *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190.

⁵⁶ *Hornby v. Lacy*, 6 M. & S. 166.

"All the cases concede it to be the right of the principal to forbid payment to the agent, and to maintain an action himself against the buyer to recover the price of the goods; or to pursue his goods, or the notes taken for them, into the hands of third parties, precisely as if no *del credere* contract existed. And, though such right in the principal would seem to consist only with a collateral undertaking by the agent, yet, in the contract *del credere*, being *sui generis*, it is held in nowise to change the original and independent character of the agent's undertaking to his principal." *Per Alvey, J.*, in *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190.

CHAPTER XVI.**DUTIES OF PRINCIPAL TO AGENT.**

- 109. Duties of Principal to Agent—In General.
- 110. Duty to Remunerate.
- 111. Implied Contract.
- 112. Right to Remuneration—Performance by Agent.
- 113. Same—Performance Prevented—Employment at will of Principal.
- 114. Revocation in Breach of Contract.
- 115. Revocation by Operation of Law.
- 116. Renunciation by Agent.
- 117. Agent's Misconduct or Breach of Duty.
- 118. Duty to Reimburse and Indemnify.
- 119. Illegal Transactions.
- 120. Rights of Subagent.
- 121. Personal Remedies of Agent.
- 122. Lien of Agent—Particular Lien.
- 123. General Lien.
- 124. Lien Possessory.
- 125. Lien of Subagent.
- 126. Right of Stoppage in Transitu.

DUTIES OF PRINCIPAL TO AGENT—IN GENERAL.

- 109. It is the duty of the principal—
 - (1) To pay the agent the remuneration agreed upon;
 - (2) To reimburse the agent for expenses incurred in the execution of his authority;
 - (3) To indemnify the agent against the consequences of acts performed in the execution of the agency.

Duty of Master to Servant.

It is the duty of the master to exercise ordinary care to protect his servants from injury while in his employment, which includes the duty to provide a safe place to work and proper instrumentalities for the performance of the work; the duty to select competent fellow servants in sufficient number; and the duty to establish proper rules for the

safe transaction of the work. The master does not guaranty the safety of the servant, who assumes the ordinary risks incident to the employment and known dangers, and the risk of negligence from fellow servants. The relation of fellow servant is commonly tested by the doctrine of vice principal, who for the purpose of the test is generally held to be one who, regardless of the grade, is actually engaged in the discharge of some positive duty owed by the common master to his servants. Although the servant assumes the risk of the negligence of fellow servants, he does not assume that of the master; and, if his negligence concurs with that of a fellow servant to produce the injury, the servant may recover, provided his own negligence does not contribute thereto. These questions, which concern the law of master and servant, are beyond the scope of this book, and the student is referred to the books upon master and servant, torts, and negligence for a consideration of them.¹

DUTY TO REMUNERATE.

- 110. An obligation on the part of the principal to remunerate the agent for his services arises only by virtue of an express or implied contract.¹**

~~SAME—IMPLIED CONTRACT.~~

- 111. Where the agent performs services on behalf of the principal at his express or implied request, and there is no express contract providing for remuneration, unless the circumstances of the employment are such that it may reasonably be inferred that the services are to be performed without remuneration a promise to pay remuneration will be implied.**

In General.

Ordinarily, an agent performing services for his principal is entitled to remuneration, but a right to remuneration is

§ 109. ¹ These topics are fully treated in the Hornbook Series in Barrows, Negligence, c. 8, and Jaggard, Torts, c. 13.

§§ 110-111. ¹ See Bowstead, Dig. Ag. art. 61.

not necessarily incidental to the relation, for the agent may undertake to perform gratuitously.² The existence of a right to remuneration and the amount thereof must in each case depend upon the express or implied terms of the contract of employment.³ To a great extent this branch of the subject is governed by the rules which apply to other contracts, and the student is referred to the works upon contracts and quasi contracts for a fuller treatment.

Express Agreement.

Where there is an express contract or agreement providing for the remuneration of the agent, the right to remuneration will, of course, be determined by its terms, and no terms inconsistent with the terms expressed will be implied.⁴ Hence, if it is expressly agreed that the agent is to serve without reward, he can acquire no right thereto, however valuable his services. And if it is agreed that the principal may determine what remuneration, if any, is to be given, the agent has no absolute right to remuneration.⁵ Again, if it is agreed that the agent is to receive remuneration only upon performing specified services or in a certain contingency, the performance of the services specified or the happening of the contingency is a condition precedent to his right to recover, and if the condition is not fulfilled there can be no recovery upon a quantum meruit.⁶ On the other hand, if the

² See Story, Ag. § 323 et seq.

³ *Reeve v. Reeve*, 1 F. & F. 280.

⁴ *Bower v. Jones*, 8 Bing. 65; *Green v. Mules*, 30 L. J. C. P. 343; *Hinds v. Henry*, 36 N. J. Law, 328; *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620.

⁵ *Taylor v. Brewer*, 1 M. & S. 290; *Roberts v. Smith*, 5 M. & W. 114.

Otherwise, if some payment is to be made but the amount is left to the employer, in which case the agent may recover such amount as the employer, acting in good faith, ought to award. *Bryant v. Flight*, 5 M. & W. 114; *Butler v. Mill Co.*, 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277.

⁶ *Green v. Mules*, 30 L. J. C. P. 343; *Moffatt v. Lawrie*, 15 C. B. 583; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Zerrahn v.*

condition is fulfilled evidence of a custom making the payment of commissions dependent upon other conditions is inadmissible.⁷

Implied Agreement.

More frequently the agent's right to compensation is not governed by express agreement, but rests upon an implied promise. *Prima facie* a promise to remunerate is to be implied from a request to perform, for it is a reasonable inference that one man will not serve another without reward.⁸ The request may be implied as well as express. A person is under no obligation to pay for services which he has not requested, but a request may be implied from conduct, as where a person having knowledge that services are being performed on his behalf maintains silence, and receives the accruing benefit without dissent.⁹

The implied promise is ordinarily to pay a reasonable remuneration; that is, whatever the services are reasonably worth.¹⁰ In commercial agencies the compensation usually takes the form of a commission, or the allowance of a certain percentage upon the amount or value of the business done. The commissions of brokers, factors, auctioneers, and other commercial agents are commonly regulated by the usage or custom of the particular business at the place where

Ditson, 117 Mass. 553; Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157; Hinds v. Henry, 36 N. J. Law, 328; Jones v. Adler, 34 Md. 440; Fultz v. Wimer, 34 Kan. 576, 9 Pac. 816.

⁷ Bower v. Jones, 8 Bing. 65.

⁸ Manson v. Baillie, 2 Macq. H. L. Cas. 80; Martin v. Roberts (O. C.) 36 Fed. 217; Lewis v. Trickey, 20 Barb. (N. Y.) 387; Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488.

⁹ McCrary v. Ruddick, 33 Iowa, 521; Wood v. Brewer, 66 Ala. 570; Weston v. Davis, 24 Me. 374. See, also, Garrey v. Stadler, 67 Wis. 512, 30 N. W. 787, 58 Am. Rep. 877; Westgate v. Monroe, 100 Mass. 227; Peacock v. Peacock, 2 Camp. 45.

¹⁰ Villas v. Downer, 21 Vt. 419; Weeks v. Holmes, 12 Cush. (Mass.) 215; Ruckman v. Bergholz, 38 N. J. Law, 531; Van Arman v. Byington, 38 Ill. 443; Millar v. Cuddy, 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181; Eggleston v. Boardman, 37 Mich. 14.

the agent is employed.¹¹ In such cases, if it is to be inferred that the parties contract upon the basis of the custom or usage, the amount and conditions of remuneration will be determined thereby.¹²

Same—Gratuitous Services.

Although a promise to remunerate is prima facie to be implied from a request to perform, it by no means follows that in every case such an implication arises, for the circumstances may indicate that it is the intention of the parties that the services are to be rendered gratuitously.¹³ Such intention may be indicated in many ways. Thus, where the parties stand in the relation of parent and child, or even are merely members of the same family, a promise to remunerate will not be implied from the mere request, but it will be assumed that the consideration or motive moving to performance is one of duty or affection, and in order to entitle the agent to compensation it must appear that there was an actual promise to compensate, or that other circumstances exist from which a promise may be implied.¹⁴ So, services are sometimes rendered with a view to obtaining a contract of employment, under circumstances which show that there is no expectation of reward unless the services result in such employment, as where an engineer or architect puts in a bid for the construction of works and furnishes plans

¹¹ Story, Ag. § 826.

¹² Read v. Rann, 10 B. & C. 438; Broad v. Thomas, 7 Bing. 99; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 963.

¹³ Osborn v. Governors of Guy's Hospital, 2 Str. 728; Baxter v. Gray, 3 M. & G. 771; Hill v. Williams, 59 N. C. 242; Morris v. Barnes, 35 Mo. 412; Montgomery v. Insurance Co., 38 C. C. A. 553, 97 Fed. 913, 919.

¹⁴ Hall v. Hall, 44 N. H. 293; Briggs v. Briggs, 46 Vt. 571; Mor-ton v. Rainey, 82 Ill. 215, 25 Am. Rep. 311; Oxford v. McFarland, 3 Ind. 156; Byrnes v. Clark, 57 Wis. 13, 14 N. W. 815; Scully v. Scully's Ex'r, 28 Iowa, 548; Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. 496; Hill v. Hill, 121 Ind. 255, 23 N. E. 87. See Clark, Contr. 28, 29, and cases cited.

and specifications, where there is no agreement to pay therefor in case of nonacceptance.¹⁵ In the absence of peculiar circumstances, however, if the person employed is one who makes it his business to act as agent, as an auctioneer, broker, factor, or attorney, a promise to remunerate is always implied.¹⁶

Services not upon Request—Ratification.

No obligation rests upon a person to pay for services rendered without his request. On the other hand, as we have seen, ratification invests the agent with the same rights as if the transaction had been previously authorized; and consequently, where an agent has performed an act upon behalf of his principal in excess of his authority, or a stranger has assumed to act as agent of another, if such person elects to ratify the act he assumes the burdens incidental thereto, and the agent may look to him for remuneration.¹⁷ Ratification can, however, have no greater force than previous authority; and, if the service was intended to be gratuitous, ratification will not render the principal liable to remunerate the agent.¹⁸

¹⁵ *Palmer v. Inhabitants of Haverhill*, 98 Mass. 483; *Scott v. Maier*, 56 Mich. 554, 23 N. W. 218, 56 Am. Rep. 402. See, also, *Moffatt v. Lawrie*, 15 C. B. 583.

¹⁶ *Manson v. Baillie*, 2 Macq. H. L. Cas. 80; *Martin v. Roberts* (C. C.) 36 Fed. 217.

¹⁷ *Ante*, p. 86.

¹⁸ *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358. See, also, *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *Osler v. Hobbs*, 33 Ark. 215; *Clark, Contr.* 198.

RIGHT TO REMUNERATION—PERFORMANCE BY AGENT.

112. When an agent is employed to perform services for remuneration, he is entitled to that remuneration, unless the contract otherwise provides, as soon as he has performed the stipulated services, although the principal acquires no benefit therefrom.

If, by the express or implied terms of the contract of employment, the remuneration of the agent is dependent upon the performance of certain services, performance is, of course, a condition of his right to recover the remuneration promised.¹ On the other hand, if the agent has fully performed,² or has substantially performed,³ his undertaking, he is entitled to the remuneration promised; and in such case it is immaterial that his services have not been beneficial to the principal, whether this result has been brought about by the conduct of the principal or by that of a third person.⁴ Thus, if a broker is employed to procure a loan, and procures a person who is ready and able to loan upon the terms prescribed by the contract of employment, the agent has earned his commission, although the principal fails to accept the loan.⁵ So, if a broker is employed to procure

§ 112. ¹ *Cook v. Fiske*, 12 Gray (Mass.) 491. See cases cited, ante, p. 441, note 6.

² *Lockwood v. Levick*, 8 C. B. (N. S.) 603; *Pearson v. Mason*, 120 Mass. 53; *Leete v. Morton*, 43 Conn. 219; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192.

³ *Horsford v. Willson*, 1 Taunt. 12; *Rimmer v. Knowles*, 30 L. T. 496, 22 W. R. 574; *Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. 150.

⁴ *Evans, Ag.* 336.

Where an agent is entitled to commissions on orders, a refusal to accept, merely to defeat the right to commissions, will not defeat such right. *Jacquin v. Boutard*, 89 Hun, 437, 35 N. Y. Supp. 496, affirmed 157 N. Y. 686, 51 N. E. 1091; *Taylor v. Morgan's Sons Co.*, 124 N. Y. 184, 26 N. E. 314.

⁵ *Green v. Lucas*, 33 L. T. (N. S.) 584; *Fisher v. Drewett*, 48 L. J. Ex. 32; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447.

a purchaser, and does procure a purchaser who is ready and able to buy upon the terms prescribed, the agent has earned his commission, although the principal refuses to sell.⁶ So, if an agent is to receive a commission upon sales made, he is entitled to his commission upon such sales although the principal is unable to execute them.⁷ What acts on the part of the agent are a sufficient performance must, of course, depend upon the terms of the particular contract of employment, and where the contract is not express will often depend upon the usage or custom of the business in which he is employed. A broker is not entitled to a commission upon a sale or other transaction unless his services are the efficient cause,⁸ but if the transaction is brought about by his agency he is entitled to his commission upon it, although it is in fact carried on and completed by the principal.⁹

⁶ *Horsford v. Wilson*, 1 Taunt. 12; *McGavock v. Woodlief*, 26 How. (U. S.) 221, 15 L. Ed. 884; *Mooney v. Elder*, 56 N. Y. 238; *Wylie v. Bank*, 61 N. Y. 415; *Fraser v. Wyckoff*, 63 N. Y. 445; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790; *Hinds v. Henry*, 36 N. J. Law, 328; *Parker v. Walker*, 86 Tenn. 566, 8 S. W. 391; *Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301; *Cassady v. Seeley*, 69 Iowa, 509, 29 N. W. 432; *Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. 150.

If the agent procures a purchaser who is able, ready, and willing, he is entitled to compensation, though the purchaser refuse to carry out the contract, and could not be compelled to do so if he set up the statute of frauds. *Holden v. Starks*, 159 Mass. 503, 34 N. E. 1069, 38 Am. St. Rep. 451. But see *Gilchrist v. Clarke*, 86 Tenn. 583, 8 S. W. 572.

⁷ *Lockwood v. Levick*, 8 C. B. (N. S.) 603. See, also, *Tyler v. E. G. Bernard Co.* (Tenn. Ch. App.) 57 S. W. 179.

⁸ *Tribe v. Taylor*, 1 C. P. D. 505; *Wylie v. Bank*, 61 N. Y. 415; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718.

⁹ *Green v. Bartlett*, 14 C. B. (N. S.) 681; *Wilkinson v. Martin*, 8 C. & P. 1; *Lincoln v. McClatchie*, 36 Conn. 136; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Jones v. Adler*, 34 Md. 440.

SAME—PERFORMANCE PREVENTED—EMPLOYMENT AT WILL OF PRINCIPAL.

113. Where the employment is at the will of the principal, and the authority is revoked after partial performance, whether the agent is entitled to remuneration for what he has done depends upon the express or implied terms of the contract.

SAME—REVOCATION IN BREACH OF CONTRACT.

114. Where the principal, in breach of an express or implied contract, revokes the authority of the agent or otherwise prevents him from earning his remuneration, the agent is entitled (1) to treat the contract as rescinded and recover upon a quantum meruit for services rendered; or (2) to recover damages for the loss resulting from the breach.

SAME—REVOCATION BY OPERATION OF LAW.

115. Where the contract of employment is discharged by operation of law, the agent or his representatives may, as a rule, recover upon a quantum meruit to the extent of services rendered.

Revocation by Act of Principal.

As we have seen, the principal has the power, although not always the right, to revoke the authority of his agent at any time.¹ In other words, the exercise of the power of revocation is without prejudice to any claim for damages that the agent may have for breach of the contract of employment.

Same—Contract of Employment at Will of Principal.

Where the principal has the right as well as the power to terminate the employment at his will, the question whether the agent is entitled to remuneration for services already performed depends upon the express or implied terms of

the contract. It is, of course, competent for the parties to contract upon such terms that the agent takes the risk of revocation of authority or discharge from employment, and shall be entitled to no remuneration in case of revocation or discharge before full performance.² On the other hand, where the contract of employment contemplates that the agent shall incur trouble and expense, although the employment be terminable at the will of the employer, a promise to pay the agent reasonable remuneration for the trouble which he may actually incur will ordinarily be implied.³ The contract may, of course, expressly provide for such remuneration in the event of revocation.⁴

Same—Revocation in Breach of Contract of Employment.

Where the contract of employment is for a definite term, and the principal without just cause revokes the agent's au-

² Where an agent was employed to sell an advowson, and without communicating with him the principal sold the living himself, it was held, in an action charging wrongful revocation of authority, that in the absence of evidence of expense incurred the agent could recover nothing. "I take it to be admitted," said Jervis, C. J., "that it is not competent to a principal to revoke * * * without paying for labor and expenses incurred. * * * A general employment may carry with it a power of revocation on payment only of a compensation for what may have been done under it; but there may also be a qualified employment under which no payment shall be demandable if countermanded. In the present case I think the employment of the qualified class * * * the plaintiffs undertaking the business upon an understanding that they were to have nothing if they did not sell the advowson, taking the chance of the larger remuneration they would have received if they had succeeded." *Simpson v. Lamb*, 17 C. B. 603. See, also, *Read v. Rann*, 10 B. & C. 438; *Broad v. Thomas*, 7 Bing. 99; *Coffin v. Landis*, 46 Pa. 426; *Spear v. Gardner*, 16 La. Ann. 383.

³ *Simpson v. Lamb*, 17 C. B. 603. See, also, *U. S. v. Jarvis*, Dav. (U. S.) 274, Fed. Cas. No. 15,468; *Blackstone v. Buttermore*, 53 Pa. 266; *Chambers v. Seay*, 73 Ala. 372, 378; *Urquhart v. Mortgage Co.*, 85 Minn. 69, 88 N. W. 264.

⁴ *Re London & S. Bank*, L. R. 9 Eq. 149; *Re Imperial Wine Co.*, L. R. 14 Eq. 417.

thority or otherwise terminates the employment, the agent is entitled to the usual remedies for breach of contract.⁵ Like a servant who is wrongfully discharged, he may pursue either of two remedies: (1) He may treat the contract as rescinded and sue his employer upon a quantum meruit for any services actually rendered, based upon an implied or quasi contract; ⁶ (2) he may maintain an action upon the original contract to recover damages for the loss resulting from its breach.⁷

If he elects the latter remedy, he may sue at once and recover the probable damages for the breach,⁸ or he may wait until expiration of the term, and sue for the actual damages he has sustained.⁹ Whether he sues at once, or not until after expiration of the term, the measure of damages is prima facie the amount of remuneration provided by the contract, but it is open to the defendant to reduce the amount of the recovery by proof of the amount which the

⁵ Clark, Contr. 693; Smith, Mast. & S. 96; Wood, Mast. & S. § 127.

⁶ Phillips v. Wiginton, 1 Ad. & E. 333; Prickett v. Badger, 1 C. B. (N. S.) 296; Howard v. Daly, 61 N. Y. 362, 369, 19 Am. Rep. 285; Derby v. Johnson, 21 Vt. 17; Brinkley v. Swicegood, 65 N. C. 626; Britt v. Hays, 21 Ga. 157; Urquhart v. Mortgage Co., 85 Minn. 69, 88 N. W. 264.

⁷ Goodman v. Pocock, 15 Q. B. 576; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Moody v. Leverich, 4 Daly (N. Y.) 401; Derby v. Johnson, 21 Vt. 17; Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8; James v. Allen Co., 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

⁸ Pierce v. Railroad Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed 591; Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1011; Sutherland v. Wyer, 67 Me. 64; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Britt v. Hays, 21 Ga. 157.

⁹ Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1011; Remelee v. Hall, 31 Vt. 582, 76 Am. Dec. 140; Sutherland v. Wyer, 67 Me. 64.

In some cases it has been held that if action be brought before expiration of the term damages can be allowed only to the time of trial. Fowler v. Armour, 24 Ala. 194; Gordon v. Brewster, 7 Wis. 355; Litchenstein v. Brooks, 75 Tex. 196, 12 S. W. 975. See, also, Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319.

agent in the one case might have earned by the exercise of reasonable diligence in seeking employment in similar business,¹⁰ and in the other case by the amount which, in the interim, he has actually earned or which he might have earned with reasonable diligence.¹¹ The burden rests upon the defendant to show that the plaintiff has or might have secured other employment.¹² But while it is the duty of the discharged employé to seek other employment, at the risk of having his recovery reduced by the amount which he might thereby have earned, he is not bound to seek employment of a different character or in a different locality or with an objectionable person.¹³

It was formerly held in England that a servant or agent who was wrongfully discharged might elect to treat the contract as continuing, and by holding himself in readiness to perform until expiration of the term of employment then have the right to recover his wages for the term, upon the ground of constructive service.¹⁴ This doctrine has been repudiated in England, and generally in the United States,¹⁵ although it prevails in some states.¹⁶ By the generally ap-

¹⁰ *Pierce v. Railroad Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591; *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1011; *Sutherland v. Wyer*, 67 Me. 64; *Hamilton v. Love*, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384.

¹¹ *Leatherberry v. Odell* (C. C.) 7 Fed. 641; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Sutherland v. Wyer*, 67 Me. 64; *Horn v. Association*, 22 Minn. 233.

¹² *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285. See, also, cases cited note 10.

¹³ *Costigan v. Railroad Co.*, 2 Denio (N. Y.) 600, 43 Am. Dec. 758; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Wood, Mast. & S.* p. 250.

¹⁴ *Gandell v. Pontigny*, 4 Camp. 375.

¹⁵ *Elderton v. Emmens*, 6 C. B. 178; *Goodman v. Pocock*, 15 Q. B. 576; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Moody v. Leverich*, 4 Daly (N. Y.) 401; *Hamill v. Foute*, 51 Md. 419; *James v. Allen County*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

¹⁶ *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Allen v. Engineers' Co.*, 196 Pa. 512, 46 Atl. 890.

proved doctrine, however, the employé, unless he elects to treat the contract as rescinded, is confined to an action for breach of contract; and while in such an action the stipulated remuneration is, *prima facie*, the measure of recovery, this may be reduced, as has been explained, by the amount of what he has or ought to have earned.

The same principles are applicable where the contract of employment, although not for a definite term, expressly or impliedly binds the employer not to revoke the authority before the transaction is completed or otherwise to prevent the agent from earning his commission. As we have seen, where the contract contemplates that the agent shall incur trouble and expense, a promise to pay a reasonable remuneration for services actually rendered in the event of a revocation will readily be implied.¹⁷ But the nature and terms of such an employment or the custom or usage of the particular business may be such as to indicate that it is the understanding that the authority shall not be revoked, or the agent otherwise be prevented from earning his commission, before the agent has completed the transaction, or, at least, until he has had a reasonable opportunity to complete it. Thus, it has been said that a broker employed to make a sale is usually entitled to a fair and reasonable opportunity to perform, subject to the right of the principal to sell independently.¹⁸ The right of the principal to revoke

¹⁷ Ante, p. 448.

¹⁸ *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Inchebald v. Western Neilgherry Coffee, Etc., Co.*, 17 C. B. (N. S.) 733; *Queen of Spain v. Parr*, 39 L. J. Ch. 73; *Simpson v. Lamb*, 17 C. B. 603; *Strong v. West*, 110 Ga. 382, 35 S. E. 693.

Where a contract with an agent for sale provided that after the agent had made an agreement for sale the owner should not intentionally defeat it, nor at any time withdraw the property from sale without giving 30 days' notice, and the owner having refused to be bound by an authorized agreement for sale, or to execute a deed, the agent delivered to the purchaser the contract of sale, which the latter accepted and was ready to perform, the agent was entitled to recover a sum equivalent to his commissions. *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. 215.

the authority is also subject to the requirements of good faith upon his part. Hence, if a broker has instituted negotiations which are approaching success, the principal is not entitled to revoke the authority with a view to concluding the bargain without his aid, and thus avoiding the commissions about to be earned.¹⁹

The principal has, of course, always the right to terminate the agency for any gross breach of duty upon the part of the agent.²⁰

Same—Revocation by Operation of Law.

As a rule the circumstances which by operation of law terminate the authority of the agent²¹ also operate to discharge the contract of employment. Thus, upon the death of the employer, the agent is discharged from performance,²² and he may recover only upon a quantum meruit to the extent of his performance. So, upon the death²³ or physical or mental incapacity²⁴ of the agent, the contract is discharged, and he or his personal representatives may recover upon a quantum meruit, subject to the right of the principal

¹⁹ *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441.

²⁰ *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441.

If the broker procures an offer which is rejected, there being no agreement by which he is bound to accept it, and the negotiations are voluntarily abandoned and the agency is terminated, a sale to the person who made the offer does not render the owner liable for a commission. *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15. Post, p. 454.

²¹ Ante, p. 143.

²² *Farrow v. Wilson*, L. R. 4 C. P. 744; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578.

Otherwise in case of bankruptcy. *Lewis v. Insurance Co.*, 61 Mo. 534; *Vanuxem v. Bostwick* (Pa.) 7 Atl. 598.

²³ *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Underwood v. Lewis* [1894] 2 Q. B. 306.

²⁴ *Robinson v. Davison*, L. R. 6 Ex. 269; *Boast v. Firth*, L. R. C. P. 1; *Fuller v. Brown*, 11 Metc. (Mass.) 440; *Fenton v. Clark*, 11 Vt. 557; *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201 (imprisonment), but see *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93; *Green*

to have the recovery reduced by the amount of any loss which he may have suffered from the nonperformance of the contract.²⁵ The right to recover, except on a full performance, may, however, be excluded by the express terms of the contract.²⁶

SAME—RENUNCIATION BY AGENT.

116. Where the agent, in breach of an entire contract of employment, renounces his authority, he can in most jurisdictions recover nothing, although in some jurisdictions he can recover upon a quantum meruit.

If an agent without legal excuse abandons the employment before full performance, he can recover nothing for his services, neither upon the contract of employment, because under an entire contract performance is a condition precedent to the right of recovery thereon, nor upon an implied contract, because the special contract controls the rights of the parties in respect to what has been done under it, and excludes any implied contract.¹ In some states, however, the rule has been so far relaxed as to permit a recovery upon a quantum meruit to the extent of benefits actually conferred, the amount of the recovery, if any, being esti-

v. Gilbert, 21 Wis. 395; Walsh v. Fisher, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865 (violence by strikers).

Prevalence of contagious disease is a discharge. Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77. But see Dewey v. School Dist., 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206. See Clark, Contr. 683.

²⁵ Patrick v. Putnam, 27 Vt. 759; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388.

²⁶ Cutter v. Powell, 6 T. R. 320; Clark, Contr. 320.

§ 116. ¹ Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Olmstead v. Beale, 19 Pick. (Mass.) 528; Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Hansell v. Erickson, 28 Ill. 257; Thrift v. Payne, 71 Ill. 408; Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; Diefenback v. Stark, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719.

Otherwise of an infant. Whitmarsh v. Hall, 3 Denio (N. Y.) 375; Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251.

mated at the contract price, with deduction of what it would cost to procure a completion of the residue of the service and also of any damages sustained by reason of the breach.² Again, the right to remuneration for partial performance may be expressly or impliedly reserved, as where the contract provides that the agent may quit at any time upon notice.

SAME—AGENT'S MISCONDUCT OR BREACH OF DUTY.

117. Where the agent is guilty of a breach of any fiduciary duty, or where the principal derives no benefit from the agent's services in consequence of his gross negligence or other breach of duty, he can recover no remuneration.

It has already been pointed out that for a breach of the agent's duty to obey instructions, to exercise reasonable care and skill, to act in good faith, and the like, the principal may terminate the agency without incurring liability on that account,¹ and the agent will, of course, lose all right to remuneration for further services. A breach of duty may also have the effect of debarring the agent from recovering remuneration for services already rendered. That such is the effect of violation of any duty arising from the fiduciary character of the relation is universally recognized,² even if the transaction is adopted by the principal.³ Thus, if the agent is guilty of fraud or bad faith, he forfeits all claim to compensation.⁴ So if he makes a sale directly or indirectly to

² *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *McClay v. Hedge*, 18 Iowa, 66; *Parcell v. McComber*, 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366. See *Wood, Mast. & S.* § 147.

§ 117. ¹ *Ante*, p. 452.

³ *Gray v. Haig*, 20 Beav. 219; *In re Owens*, 1 R. 7 Eq. 235.

⁴ *Solomans v. Pender*, 3 H. & C. 639.

If in ignorance of the fraud the principal pays, he may recover, *McGur v. Adams*, 65 Ala. 106.

⁴ *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; *Allen v. Pierpont* (C. C.) 22 Fed. 582; *Blair v. Shaeffer* (C. C.)

himself or to a company in which he is interested.⁵ The right of the agent to compensation where he acts for both parties has already been considered.⁶ A forfeiture of compensation may also result from negligence of the agent. If the agent is guilty of gross negligence in the conduct of the business intrusted to him, so that the principal derives no benefit therefrom, the agent is entitled to no remuneration;⁷ but if, notwithstanding his negligence, the services are of some value after making allowance for the loss sustained, it seems that he can recover their reasonable value.⁸ So rendering false accounts, or even gross neglect to keep accounts and preserve vouchers, works a forfeiture of commissions,⁹ although a mere failure to render an account at the stipulated time,¹⁰ or irregularity in the account when not fraudulent and admitting of explanation, will not necessarily work a total forfeiture, and may simply reduce the amount of the compensation by the amount of any necessary dam-

33 Fed. 218; *Sea v. Carpenter*, 16 Ohio, 412; *Martin v. Bliss*, 57 Hun. 157. 10 N. Y. Supp. 886; *Porter v. Silvers*, 35 Ind. 205; *Brannan v. Strauss*, 75 Ill. 234; *Segar v. Parrish*, 20 Grat. (Va.) 672; *Urquhart v. Mortgage Co.*, 86 Minn. 69, 88 N. W. 264.

⁵ *Solomans v. Pender*, 3 H. & C. 639; *In re Owens*, L. R. 7 Eq. 235; *Hoffeln v. Moss*, 14 C. C. A. 459, 67 Fed. 440; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *McGar v. Adams*, 65 Ala. 106; *Hobson v. Peake*, 44 La. Ann. 383, 10 South. 762.

⁶ *Ante*, p. 418.

⁷ *Bracey v. Carter*, 12 Ad. & E. 373; *Denew v. Daverell*, 3 Camp. 451; *Hurst v. Holding*, 3 Taunt. 32; *Fordyce v. Peper* (C. C.) 16 Fed. 516; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Bledsoe v. Irvin*, 35 Ind. 293; *Fisher v. Dynes*, 62 Ind. 348; *Sumner v. Reicheniker*, 9 Kan. 320.

⁸ *Lee v. Clements*, 48 Ga. 128; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

⁹ *White v. Lincoln*, 8 Ves. Jr. 363; *Fordyce v. Peper* (C. C.) 16 Fed. 516; *Motley v. Motley*, 42 N. C. 211; *Ridgeway v. Ludlam*, 7 N. J. Eq. 123; *Smith v. Crews*, 2 Mo. App. 269; *Fish v. Seeburger*, 154 Ill. 30, 39 N. E. 982.

¹⁰ *Sampson v. Iron Works*, 6 Gray (Mass.) 120.

ages.¹¹ An agent is entitled to no compensation for an unauthorized transaction unless the principal ratifies it.¹²

DUTY TO REIMBURSE AND INDEMNIFY.

118. It is the duty of the principal to reimburse the agent for all expenses, advances, and disbursements properly paid or incurred, and to indemnify him against the consequences of all acts properly done by him in the execution of the agency.

Duty to Reimburse.

"Speaking generally, the agent has the right to be reimbursed for all his advances, expenses, and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses, and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent."¹ The liability of the principal arises from an implied contract, a request to undertake an agency the proper execution of which may involve expenditure on the agent's part operating as an implied request to incur such expenditure and as an implied promise to repay.² It necessarily follows that the agent is not entitled to reimbursement in respect to any expenditure incurred without the express or implied authority of the principal.³ Nor is he entitled to reimbursement in respect to any expenditure in-

¹¹ Jones v. Hoyt, 25 Conn. 374; Lee v. Clements, 48 Ga. 123.

¹² Ante, p. 444.

§ 118. ¹ Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, per Jackson, J. See, also, Smith v. Lindo, 5 C. B. (N. S.) 387; Frixione v. Tagliaferro, 10 Moore, P. C. 175; Curtis v. Barclay, 7 D. & R. 539, 5 B. & C. 141; Bartlett v. Smith (C. C.) 13 Fed. 263; Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125; Ruffner v. Hewitt, 7 W. Va. 585; Armstrong v. Pease, 66 Ga. 70.

² Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

³ Warwick v. Slade, 3 Camp. 127 (authority revoked); Barron v. Fitzgerald, 6 Bing. N. C. 201; Keyes v. Inhabitants of Westford, 17 Pick. (Mass.) 273.

curred in consequence of his own negligence or breach of duty.⁴ Thus, where a solicitor undertook a prosecution, which failed in consequence of the negligent way in which the indictment was drawn, he was not entitled to recover his disbursements.⁵

Duty to Indemnify,

The duty of the principal to indemnify the agent against losses and liabilities which are the consequences of the acts done by him in the execution of the agency rests upon the same ground.⁶ If the proper execution of the agency involves or may involve acts from which loss or liability may result, the request to undertake the agency operates as an implied promise to indemnify the agent against such loss or liability.⁷ Thus, where an agent sold cotton and was obliged to refund the price to the purchaser on account of false packing by the principal, he was allowed to recover from him the amount so refunded.⁸ If, in the proper execution of his authority, the agent becomes personally liable upon a contract made for his principal, the agent can look to the principal for any damages sustained in consequence.⁹ So, if an agent without notice of adverse title sells goods under instructions from his principal, who claims them as owner, and is compelled to pay to the true owner the value of the goods, the agent is entitled to indemnity.¹⁰ And, where an agent is authorized to deal in a particular market or

⁴ *Lewis v. Samuel*, 8 Q. B. 685; *Brown v. Clayton*, 12 Ga. 574; *Veltum v. Koehler*, 85 Minn. 125, 88 N. W. 482.

⁵ *Lewis v. Samuel*, 8 Q. B. 685.

⁶ *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

⁷ *Hooper v. Treffey*, 1 Ex. 17; *Cropper v. Cook*, L. R. 8 C. P. 199; *Lacey v. Hill*, *Crawley's Claim*, L. R. 18 Eq. 182; *D'Arcy v. Lyle*, 5 Bin. (Pa.) 441; *Maitland v. Martin*, 80 Pa. 120; *Powell v. Trustees*, 19 Johns. (N. Y.) 284; *Denny v. Wheelwright*, 60 Miss. 733; *Save-land v. Green*, 36 Wis. 612. But see *Halbronn v. International Horse Agency* [1903] 1 K. B. 270.

⁸ *Beach v. Branch*, 57 Ga. 362.

⁹ *Greene v. Goddard*, 9 Metc. (Mass.) 212.

¹⁰ *Adamson v. Jarvis*, 4 Bing. 66. See, also, *Drummond v. Humphreys*, 39 Me. 347; *Castle v. Noyes*, 14 N. Y. 329; post, p. 460.

trade, he is thereby authorized to deal according to the established usage thereof, provided the usage is reasonable, and not inconsistent with his instructions; and if, in accordance with such usage, he incurs expenses or liability, he is entitled to be reimbursed and indemnified on that account.¹¹ Thus, where brokers were compelled by the rules of the New York Cotton Exchange, of which the principal had notice, to go into the market and buy cotton to cover their contracts for future delivery on their principal's account, by reason of his failure to furnish margins, the brokers were entitled to recover the difference between the price at which the cotton was to be sold and the increased price so paid to cover the contracts.¹² No indemnity can be recovered for a loss incurred in consequence of the agent's negligence or breach of duty.¹³

¹¹ *Bayliffe v. Butterworth*, 1 Ex. 425; *Taylor v. Stray*, 2 C. B. (N. S.) 197; *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Talcott v. Smith*, 142 Mass. 542, 8 N. E. 413.

Usage must be so general, long established, and notorious that knowledge of it may be presumed. *Earl Fruit Co. v. Warehouse Co.*, 60 Minn. 351, 62 N. W. 439.

¹² *Bibb v. Allen*, 149 U. S. 481. 13 Sup. Ct. 950, 37 L. Ed. 819.

"It is settled by the weight of authority that, where a principal sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal, provided the transaction * * * is legal in its character." Per Jackson, J.

¹³ *Capp v. Topham*, 6 East, 392 (mistake of law); *Bally v. Burgess*, 48 N. J. Eq. 411, 22 Atl. 733; *Haskin v. Haskin*, 41 Ill. 197.

Where a stockbroker was instructed to carry over stock to the next settlement, but before the settling day became insolvent and was declared a defaulter, in consequence of which the stock was sold at a loss, the principal was not bound to indemnify him, the loss having been caused by the broker's insolvency. *Duncan v. Hill*. *Duncan v. Beeson*, L. R. 8 Ex. 242. Cf. *Hartas v. Ribbons*, 22 Q. B. D. 254.

ILLEGAL TRANSACTIONS.

119. An agent is not entitled to remuneration, reimbursement, or indemnity in respect to any transaction which is apparently, or to his knowledge, illegal.

An agent, as a rule, cannot recover compensation for acts done in violation of law. If a statute or ordinance makes it unlawful for a particular class of agents to transact business without a license, such agent so transacting business cannot recover commissions for his services.¹ If the object of the agency is the performance of an apparently illegal act, the contract of employment is void, and there can be no recovery.² Some examples of illegal agencies have already been given.³ And since ignorance of the law is no excuse, if the act or transaction for which the agent is employed is prohibited at common law, or by statute or public policy, there can be no recovery notwithstanding that the agent is ignorant of the law, provided he has sufficient knowledge

§ 119. ¹ *Cope v. Rowlands*, 2 M. & W. 149 (broker); *Polk v. Force*, 12 Q. B. 666 (appraiser); *Brunswick v. Crowl*, 4 Ex. 492 (solicitor whose certificate is not in force); *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 637.

In *Smith v. Lindo*, 5 C. B. (N. S.) 587, it was held that, although an unlicensed broker could not sue for commission, he might recover money which he had been obliged to pay.

² *Illegal sale of offices.* *Stackpole v. Erle*, 2 Wills. 133; *Parsons v. Thompson*, 14 Bl. 322; *Waldo v. Martin*, 4 B. & C. 319.

Procuring government contracts by corrupt means. *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746.

On appointment to office. *Meguire v. Corwine*, 101 U. S. 108, 25 L. Ed. 809; *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Gray v. Hook*, 4 N. Y. 449.

Lobbying. *Trist v. Child*, 21 Wall. (U. S.) 441, 22 L. Ed. 623; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213.

Combination to corner market. *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499.

³ *Ante*, p. 92.

of the facts to be charged with knowledge that the act or transaction is illegal. Thus, an agent who is employed to sell intoxicating liquor where such sale is illegal cannot recover remuneration under any circumstances.⁴ On the other hand, an agent who is employed in a transaction which is apparently legal may recover remuneration notwithstanding that by reason of facts of which he is ignorant the act is illegal. Thus, an agent employed to sell goods who is ignorant of the fact that they belong to a person other than his principal may recover compensation notwithstanding that his sale was a conversion.⁵ So, a broker who in good faith negotiates a contract for future delivery of merchandise will be allowed to recover his commissions, notwithstanding the actual intent of the parties to speculate in margins without actual delivery, and the consequent illegality of the transaction as a gaming or wagering contract, provided he is not privy to the illegal character of the agreement; although if he is privy to the unlawful design, and brings the parties together for the purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover.⁶

The same distinctions govern the right of the agent to

⁴ *Bixby v. Moor*, 51 N. H. 402.

⁵ *Post*, p. 461.

⁶ *Irwin v. Williar*, 110 U. S. 490, 4 Sup. Ct. 160, 28 L. Ed. 225; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862.

Gaming and wagering contracts are in the United States generally held to be illegal as against public policy. *Irwin v. Williar*, *supra*, and cases cited.

In England such contracts were held not to be illegal. By 8 & 9 Vict. c. 109, they were rendered null and void, but not made illegal, and notwithstanding the act money paid by the agent in pursuance of such a contract was recoverable from the principal. *Read v. Anderson*, 13 Q. B. D. 779; *Thacker v. Hardy*, 4 Q. B. D. 685; *Knight v. Lee* [1893] 1 Q. B. 41.

Since the Gaming Act 1892 (55 Vict. c. 9), however, no compensation, reimbursement, or indemnity is recoverable by the agent in respect to such a contract. *Tatam v. Reeve* [1893] 1 Q. B. 44. See *Bowstead*, Dig. Ag. arts. 65, 69.

recover reimbursement and indemnity. If the transaction is apparently or to his knowledge illegal, he cannot recover; but if otherwise, he can.⁷ An agent employed to buy smuggled goods cannot recover his advances made in the purchase;⁸ nor can a broker who effects illegal insurance recover the premiums which he has paid.⁹ An agent employed to sell goods which he knows to belong to a third person or to commit a trespass upon land cannot recover indemnity if he is compelled to respond in damages to the owner of the goods or of the land; but if he has no knowledge of the adverse title, and sells the goods or enters upon the land under direction of his principal, who claims as owner, and a recovery is subsequently had against him for damages for the conversion or trespass, he is entitled to indemnity.¹⁰ So, if a broker in good faith negotiates a contract for future delivery of merchandise under the circumstances mentioned in the last paragraph, he may recover reimbursement for his advances or indemnity for liability which he has incurred in execution of the authority, notwithstanding that by reason of the illegal intent of the parties to which he was

⁷ *Bibb v. Allen*, 149 U. S. 498, 13 Sup. Ct. 950, 37 L. Ed. 819.

⁸ *Ex parte Mather*, 3 Ves. 373.

⁹ *Allkins v. Jupe*, 2 C. P. D. 375.

¹⁰ *Adamson v. Jarvis*, 4 Bing. 66 (auctioneer having no knowledge of defect of title); *Drummond v. Humphreys*, 39 Me. 347 (cutting timber on land not owned by principal); *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *Howe v. Railroad Co.*, 37 N. Y. 297; *Moore v. Appleton*, 26 Ala. 633; *Nelson v. Cook*, 17 Ill. 443.

"Every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him from all such acts as would be lawful if the employer had the authority he pretends to have." *Adamson v. Jarvis*, *supra*, per Best, C. J.

The rule that one wrongdoer cannot sue another for contribution does not apply to cases of indemnity where one employs another to do acts not unlawful in themselves, for the purpose of asserting a right. See *Adamson v. Jarvis*, *supra*; *Merryweather v. Nixan*, 8 Term R. 186; *Betts v. Gibbins*, 2 Ad. & E. 57.

not privy the transaction is illegal, but if he is privy thereto he cannot recover.¹¹

RIGHTS OF SUBAGENT.

120. Where a subagent is employed on behalf of the principal, and privity of contract exists between them, the subagent may look to the principal for remuneration, reimbursement, and indemnity; but otherwise he must look to his immediate employer.

Where a subagent is employed without authority of the principal, since no privity of contract exists between them, the subagent must look solely to his immediate employer for compensation, reimbursement, and indemnity.¹ Even if the employment is authorized, the right of the subagent to look to the principal will depend upon whether the agent was authorized to employ the subagent upon the principal's behalf and to create privity of contract between them, or was merely authorized to employ a subagent upon his own behalf and responsibility.² In the first case the subagent can look to the principal,³ but in the latter he can look only to the agent.⁴ The same principles apply where the authority of an agent to employ a subagent is derived from ratifi-

¹¹ Cases cited in note 6, *supra*.

§ 120. ¹ *Schmalig v. Tomlinson*, 6 Taunt. 147; *Sims v. Brittain*, 1 N. & M. 594; *Johnson v. Steamship Co.*, 5 Cal. 407; *Cleaves v. Hoyt*, 33 Mo. 341; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; *Hilbard v. Peck*, 75 Wis. 619, 44 N. W. 641.

² Ante, p. 123 et seq.

³ *Keay v. Fenwick*, 1 C. P. D. 745; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *McConnell v. McCormick*, 12 Cal. 142; *Cotton States Life Ins. Co. v. Mallard*, 57 Ga. 64.

Unless exclusive credit is given to the principal, the agent also is liable. *Story*, Ag. §§ 386, 387; *Wilkins v. Duncan*, 2 Litt. (Ky.) 168; *Miles v. Mays*, 15 Colo. 133, 25 Pac. 312; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246.

⁴ *Hill v. Morris*, 15 Mo. App. 322; *Corbett v. Schumacker*, 83 Ill. 403.

cation.⁵ If the employment purported to be of the sub-agent as agent of the principal, ratification with knowledge that such was the employment would create privity of contract and render the principal liable to the subagent;⁶ but, if the employment was upon behalf of the agent, ratification would have no such effect.⁷

PERSONAL REMEDIES OF AGENT.

121. The agent may maintain an action at law against his principal for the recovery of his remuneration, reimbursement, and indemnity, and, if the accounts are so complicated that they cannot be disposed of in an action at law, may have an account taken in a court of equity.

It follows from what has been said that the agent has a right to recover from his principal whatever may be due him on account of his remuneration, reimbursement, or indemnity by action at law; and he may avail himself of any such claims or demands, when sued for the funds of his principal in his hands, by way of recoupment, set-off, or counterclaim.¹ In a proper case he may have an accounting in a court of equity;² but the right on the part of the agent to an accounting in equity, unlike the right of the principal to such an accounting,³ arises only when the accounts are of so complicated a nature that they cannot be properly and conveniently gone into by a jury.⁴

⁵ Ante, p. 125.

⁶ Keay v. Fenwick, 1 C. P. D. 745; Mason v. Clifton, 3 F. & F. 899. See, also, Dewing v. Hutton, 48 W. Va. 576, 37 S. E. 670. Cf. Grace v. Insurance Co., 16 Blatchf. (U. S.) 433, Fed. Cas. No. 5,648.

⁷ Homan v. Insurance Co., 7 Mo. App. 22. See, also, Hansback v. Corrigan, 7 Kan. App. 479, 54 Pac. 129.

§ 121. ¹ Story, Ag. § 350.

² Padwick v. Hurst, 18 Beav. 575; Harrington v. Churchward, 20 L. J. Ch. 521.

³ Ante, p. 435.

⁴ Padwick v. Stanley, 9 Hare, 627; Smith v. Levoux, 1 H. & M.

LIEN OF AGENT—PARTICULAR LIEN.

122. The agent has a particular lien upon the goods and chattels of the principal lawfully in his possession as agent for what is due him as agent in respect to the property subject to the lien, unless the existence of such lien is inconsistent with the express or implied agreement of the parties.

SAME—GENERAL LIEN.

123. In addition to his particular lien, an agent may have a general lien upon the goods and chattels of the principal lawfully in his possession as agent for any general balance of accounts due him as agent, independently of what is due him in respect to the property subject to the lien. A general lien, unless conferred by statute, arises only by express or implied agreement, except in favor of factors, insurance brokers, bankers, attorneys at law, and some other classes of agents who by usage have a general lien.

SAME—LIEN POSSESSORY.

124. The lien of an agent is possessory, and consists in the right to retain possession of the goods and chattels subject thereto until satisfaction of the debts or obligations thereby secured.

Lien of Agent—Particular or General.

In addition to his personal remedies for the recovery of his remuneration, reimbursement, and indemnity the agent has the right of lien. A lien at common law may be defined as the right to retain possession of a thing until a debt due to the person retaining possession is satisfied. A lien may be particular or general. Where the right is to retain the thing which is the subject of the lien for charges or demands growing out of or connected with that identical thing, the lien is particular. Where the right is to retain the thing not only for charges or demands growing out of or connected with that particular thing, but for a general

balance due from the owner, the lien is general. Unless there is an express or implied agreement to the contrary, an agent has a particular lien upon the goods, chattels, and funds of his principal intrusted to him in the course of the agency or rightfully coming into his possession as agent. The lien of the agent is merely a particular lien, unless there is an express agreement for a general lien, or unless an agreement for a general lien is to be implied from a previous course of dealing or other circumstances,¹ or unless he belongs to a class of agents who have a general lien. Thus, an auctioneer has a particular lien upon the goods intrusted to him for sale and upon their proceeds for his commissions and the charges of sale,² a broker employed to procure a loan has a particular lien for his commissions upon the proceeds of the loan,³ but neither has a general lien. On the other hand, factors,⁴ insurance brokers,⁵ solicitors and attorneys,⁶ bankers,⁷ and some other classes of agents,⁸ have a general lien. The general lien of these classes of agents has its origin in the general usage of trade, which has become so fixed that the courts take notice of it without proof. A general lien is sometimes conferred upon

123, 33 L. J. Ch. 167; *Skilton v. Payne*, 18 Misc. Rep. 332, 42 N. Y. Supp. 111; *Johnston v. Berlin*, 35 Misc. Rep. 146, 71 N. Y. Supp. 454.

§§ 122-124. ¹ *Bock v. Gorrisson*, 30 L. J. Ch. 39; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

² *Robinson v. Rutter*, 4 El. & B. 954; *Wolfe v. Horne*, 2 Q. B. D. 355.

³ *Vinton v. Baldwin*, 95 Ind. 433.

An agent who obtains possession from carrier by paying freight has lien for reimbursement. *White v. Railway Co.*, 90 Ala. 254, 7 South. 910.

⁴ Post, p. 466.

⁵ *Mann v. Forrester*, 4 Cowp. 60; *Westwood v. Bell*, 4 Camp. 349; *Moody v. Webster*, 3 Pick. (Mass.) 424; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

⁶ Post, p. 467.

⁷ Post, p. 466.

⁸ *Wharfingers. Vaylor v. Mangles*, 1 Esp. 109; *Spears v. Hartley*, 3 Esp. 81.

Packers. In re Witt, 2 Ch. D. 489.

certain classes of agents by statute.⁹ A consideration of liens peculiar to these various classes of agents is beyond the scope of this book, but a few words may be said as to the lien of factors, bankers, and attorneys.

A factor has a general lien upon the goods of his principal in his possession and upon the proceeds of such as are lawfully sold by him, and upon the securities given therefor for the general balance of the accounts between him and his principal, as well as for his charges, advances, and obligations made or incurred upon the particular goods.¹⁰ The lien extends to all sums for which he has become liable as surety.¹¹

A banker has a general lien upon all notes, bills, checks, and other securities deposited with him by his customer for the balance due him upon general account.¹² Indeed, the right of the banker in respect to securities indorsed or otherwise negotiated and deposited with him is greater than that of a mere possessory lien, since he is, in effect, a holder for value to the extent of all advances and acceptances, present and future, made by him for his customer in excess of the cash balance which may stand to his credit; and the banker may sue and recover upon the securities, at least to the amount of the balance due him.¹³

⁹ Story, Ag. § 375.

¹⁰ Story, Ag. § 376; *Kruger v. Wilcox*, Ambler, 252; *Godin v. London Assurance Co.*, 1 W. Bl. 103, 1 Burrows, 489; *Stevens v. Biller*, 25 Ch. D. 31; *Jarvis v. Rogers*, 15 Mass. 389, 396; *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; *Bryce v. Brooks*, 26 Wend. (N. Y.) 374; *Winter v. Colt*, 7 N. Y. 288, 57 Am. Dec. 522; *Nagle v. McFeeters*, 97 N. Y. 196; *Jordan v. James*, 5 Ohio, 99; *McGraft v. Rugee*, 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378; *Johnson v. Clark*, 20 Ind. App. 247, 50 N. E. 762.

¹¹ *Drinkwater v. Goodwin*, Cowp. 251. See *Hidden v. Waldo*, 55 N. Y. 294.

¹² Story, Ag. § 380; *Miser v. Currie*, 1 App. Cas. 554; *London Chartered Bank v. White*, 4 App. Cas. 413; *Brandao v. Barnett*, 12 C. & F. 787; *Swift v. Tyson*, 16 Pet. (U. S.) 1, 21, 10 L. Ed. 865.

¹³ *Scott v. Franklin*, 15 East, 428; *Percival v. Frempton*, 2 C., M. & R. 180.

An attorney at law or solicitor has a general lien upon all documents and papers, chattels and money, belonging to his client, of which he obtains possession in his professional capacity.¹⁴ In addition to his general or retaining lien, an attorney has a so-called "charging" lien upon any judgment obtained by him for his client, for his costs and disbursements incurred in the particular action, which by the aid of the court he may actively enforce.¹⁵ To a great extent the second lien, and to some extent the first, are regulated by statute.¹⁶

The existence of a general lien, however, as well as of a particular lien, may be disproved by proof of an express or implied agreement inconsistent with it.¹⁷ The rules which will be stated in the succeeding sections are applicable to both classes of liens.

Same—Property must be in Lawful Possession.

The lien, being possessory, cannot come into existence unless the agent obtains possession.¹⁸ Thus, where a factor bought goods on behalf of his principal, but it was agreed that the goods should remain upon the premises of the seller at a rent to be paid by the principal, and the agent upon request of the seller, but without authority from his principal, removed the goods to his own premises, the possession continued in the principal, and the agent was not entitled to a lien.¹⁹ So, where a factor accepted bills upon the faith of a consignment, and both he and the principal became bank-

¹⁴ *Re Broomhead*, 5 D. & L. 52; *In re Paschal*, 10 Wall. (U. S.) 483, 19 L. Ed. 992; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *In re Wilson & Greig* (D. C.) 12 Fed. 235; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *In re Knapp*, 85 N. Y. 284; *Hurlbert v. Brigham*, 56 Vt. 368.

¹⁵ *Barker v. St. Quentin*, 12 M. & W. 451.

¹⁶ See *Jones, Liens*, § 113 et seq., § 153 et seq.

¹⁷ *Post*, p. 469.

¹⁸ *Kinloch v. Cralg*, 3 T. R. 119, 783; *Taylor v. Robinson*, 2 Mos. 730; *Elliot v. Bradley*, 23 Vt. 217; *Sawyer v. Lorillard*, 48 Ala. 332.

¹⁹ *Taylor v. Robinson*, 2 Mos. 730.

rupt before arrival of the goods, the factor's trustee in bankruptcy had no lien, the goods having never been in the factor's possession.²⁰ Constructive possession, however, is sufficient.²¹ The lien does not come into existence unless the thing upon which it is sought to be asserted is obtained by the agent lawfully. A lien cannot be acquired by a wrongful or unauthorized act. Thus, an agent can have no lien upon goods which he obtains from his principal by misrepresentations.²² So, where an agent who was employed by a ship's husband without authority made the freight payable to himself, he had no lien upon the freight received by him for a debt due from his principal.²³

Same—Possession must be Acquired in Same Capacity.

Possession must have been obtained in the same capacity in which the agent claims the lien.²⁴ The lien is confined not only to what is due him as agent, but to what is due him as agent in the capacity in which he claims the lien. "A man is not entitled to a lien because he happens to fill a character which gives him such a right, unless he has received the goods, or done the act, in the particular character to which the right attaches."²⁵ Thus, the lien does not extend to a debt incurred before the commencement of the agency.²⁶ So the general lien of a factor or solicitor, or banker, does not extend to a thing of which he obtains possession as agent in another capacity.²⁷ If a factor insures a ship on behalf of his principal, a transaction which is sepa-

²⁰ *Kinloch v. Craig*, 3 T. R. 119.

²¹ *Elliot v. Bradley*, 23 Vt. 217; *Heard v. Brewer*, 4 Daly (N. Y.) 186.

²² *Madden v. Kempster*, 1 Camp. 12.

²³ *Walshe v. Provan*, 8 Ex. 843.

²⁴ *Houghton v. Matthews*, 3 B. & P. 485; *Dixon v. Stansfield*, 10 C. B. 398.

²⁵ *Per Jervis, C. J.*, in *Dixon v. Stansfield*, 10 C. B. 398.

²⁶ *Houghton v. Matthews*, 3 B. & P. 485.

²⁷ *Dixon v. Stansfield*, 10 C. B. 398; *Stevenson v. Blakelock*, 1 M. & S. 535; *In re Galland*, 81 Ch. D. 296.

rate from his duties as factor, his general lien does not extend to the policy of insurance, because he does not obtain possession in his capacity as factor.²⁸ So, securities or valuables left with a banker for safe custody are not subject to his general lien, which is confined to what is deposited with him in his capacity as banker.²⁹

Same—No Inconsistent Agreement.

Neither does the lien come into existence if there is any agreement, express or implied, clearly inconsistent with its existence.³⁰ Thus, if a factor agrees to deal with the proceeds of goods in a particular way, his general lien is excluded.³¹ So, where an insurance policy was deposited with bankers, with an agreement charging it with overdrafts not to exceed a specified amount, the bankers' general lien was excluded.³² To exclude the lien, however, it must appear that the agreement is clearly inconsistent.³³ The lien is excluded by implication if the property is delivered to the agent with express directions, or for a special purpose, inconsistent with its existence.³⁴ Thus, if an agent accepts goods

²⁸ *Dixon v. Stansfield*, 10 C. B. 398.

²⁹ No lien on muniments of title casually left at bank after refusal to loan thereon. *Lucas v. Dorrien*, 7 Taunt. 278.

³⁰ *Cowell v. Simpson*, 16 Ves. 275; *Bock v. Gorrison*, 30 L. J. Ch. 39; *Wylde v. Radford*, 33 L. J. Ch. 51; *Gilman v. Brown*, 1 Mason (U. S.) 191, Fed. Cas. No. 5,441.

³¹ *Walker v. Birch*, 6 T. R. 258.

³² *In re Bowes*, 33 Ch. D. 586.

³³ *Brandao v. Barnett*, 12 C. & F. 787, 8 C. B. 519; *Jones v. Pepperorne*, 28 L. J. Ch. 158; *Colmer v. Ede*, 40 L. J. Ch. 185; *Fisher v. Smith*, 4 App. Cas. 1 (agreement for monthly settlement does not affect lien of insurance broker for premiums, on policies in his hands); *Stevens v. Biller*, 25 Ch. D. 31 (general lien of factor not excluded because he acts under special instructions to sell in principal's name and at fixed price); *Haebler v. Luttgen*, 61 Minn. 315, 63 N. W. 720. See *Bowstead*, Dig. Ag. 185.

³⁴ *Buchanan v. Findlay*, 9 B. & C. 738; *Re Cullen*, 27 Beav. 51 (money received by solicitor to pay off mortgage).

Where goods were consigned to a factor for sale, with a state-

with directions to hold them or to apply their proceeds subject to the order of, or to deliver them to, a third person, he cannot set up his general lien in opposition to the directions.³⁵ So, where exchequer bills were deposited at a bank to be kept in a box under lock and key, and were afterwards intrusted to the banker with instructions to obtain the interest on them, and to get them exchanged for new bills, and to deposit the new bills in the boxes as before, it was held that the banker's lien did not attach upon the old or the new bills, the special purpose for which they were intrusted to him being inconsistent with a general lien.³⁶ As in the case of the lien of the seller, giving credit or accepting a negotiable instrument in conditional payment³⁷ is a waiver of the lien, which revives, however, if the goods still remain in the agent's possession when the credit expires or the paper is dishonored.³⁸

Same—Ownership of Principal.

In order that the agent may acquire a lien, not only must the possession be in him, but the ownership must be in the principal. The lien can attach only upon a thing in respect to which, as against third persons, the principal has a right to create a lien.³⁹ If, when the thing comes into the

ment that the goods would cover a bill of exchange in favor of a third person, and with a request to honor the bill, and the factor refused to accept the bill on presentment, the goods were appropriated to meet it, and the third person had a lien therefor in priority to the factor's general lien. *Frith v. Forbes*, 4 De Gex, F. & J. 409.

³⁵ *Walker v. Birch*, 6 T. R. 258; *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Jarvis v. Rogers*, 15 Mass. 389, 395.

³⁶ *Brandao v. Barnett*, 12 C. & F. 787, 3 C. B. 519.

³⁷ *Cowell v. Simpson*, 16 Ves. 275; *Rait v. Mitchell*, 14 Camp. 146; *Hewison v. Guthrie*, 2 Bing. (N. S.) 755; *Chandler v. Belden*, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634; *Au Sable River Boom Co. v. Sanborn*, 36 Mich. 358; *Jones, Liens*, § 1003.

³⁸ *Stevenson v. Blakelock*, 1 M. & S. 535.

³⁹ *Brycé v. Brooks*, 26 Wend. (N. Y.) 374.

No lien can attach on the books of a company, because the direct-

agent's possession, the ownership of the principal has been divested, no lien can arise.⁴⁰ On the other hand, if the lien has once attached, it cannot be affected by any subsequent act of the principal or by his bankruptcy.⁴¹ The rule that the thing upon which the lien attaches must be owned by the principal does not apply to money and negotiable instruments, the usual privileges attaching to negotiable paper in favor of bona fide purchasers for value without notice protecting the agent to the extent of his lien.⁴²

Same—For What Obligations Lien Attaches.

The lien attaches only to certain and liquidated demands, and not to those which sound only in damages and can be ascertained only through the intervention of a jury. Hence the lien does not extend to a demand for an indemnity against future contingent claims or damages.⁴³ Such a lien can be created only by special contract. But the obligation need not be due. Thus a factor, or other agent, who has accepted bills on the faith of a consignment or of goods in his possession has a lien for the amount of bills not yet due as well as of those which he has paid.⁴⁴

ors have no power to create a lien that could interfere with their use. *Re Capital Fire Ins. Ass'n, Ex parte Beall*, 24 Ch. D. 408; *Re Anglo-Maltese H. D. Co.*, 54 L. J. Ch. 730.

⁴⁰ *Copeland v. Stein*, 8 T. R. 199 (goods consigned to factor after bankruptcy of principal).

⁴¹ *Robson v. Kemp*, 4 Esp. 233; *Godwin v. Assurance Co.*, 1 W. Bl. 108.

⁴² *Brandao v. Barnett*, 12 C. & F. 787, 3 C. B. 519; *Bosanquet v. Dudman*, 1 Stark. 1; *Jones v. Peppercorne*, 28 L. J. Ch. 158; *Misa v. Currie*, 1 App. Cas. 554; *Swift v. Tyson*, 16 Pet. (U. S.) 1, 21, 10 L. Ed. 865.

⁴³ *Story*, Ag. § 364.

⁴⁴ *Hammond v. Barclay*, 2 East, 227; *In re Pavy's Pat. F. F. Co.*, 1 Ch. D. 631; ante, p. 466.

Same—Termination of Lien.

The lien is terminated if the agent voluntarily gives up possession,⁴⁵ unless he is induced to do so by fraud⁴⁶ or mistake, or possession is obtained from him illegally.⁴⁷ But, although the agent parts with possession by making an authorized sale of goods, the lien attaches to the proceeds of sale.⁴⁸ The agent abandons his lien even if his transfer of possession be wrongful, as when he tortiously sells or pledges goods for advances made to himself,⁴⁹ or causes them to be taken on execution at his own suit.⁵⁰ On the other hand, he may pledge the goods as security to the extent of the amount due him, for which he has a lien, if he notifies the pledgee that he is to hold only for the lien, the constructive possession in that case continuing in the agent, and the pledgee having, in effect, a mere custody.⁵¹

Again, the agent may expressly waive his lien, or may waive it by entering into an agreement which is inconsistent with its continuance.⁵² Taking other security for the debt or obligation is an abandonment,⁵³ provided the nature of the security and the circumstances under which it is taken are inconsistent with its continuance or indicate an intention

⁴⁵ Sweet v. Pym, 1 East, 4 (delivery to carrier for principal); Levy v. Barnard, 2 Moore, 34; Rosenbaum v. Hayes, 8 N. D. 461, 79 N. W. 987.

⁴⁶ Wallace v. Woodgate, 1 O. & P. 575, R. & M. 193; Bigelow v. Heaton, 6 Hill (N. Y.) 43.

⁴⁷ Dicus v. Stockley, 7 C. & P. 587.

⁴⁸ Ante, p. 466.

⁴⁹ McComble v. Davies, 4 East, 7; Jarvis v. Rogers, 15 Mass. 389, 390; Walker Co. v. Produce Co., 106 Iowa, 245, 76 N. W. 673; Id., 113 Iowa, 428, 85 N. W. 614, 53 L. R. A. 775 (sale amounting to conversion).

⁵⁰ Jacobs v. Latour, 5 Bing. 130.

⁵¹ Man v. Shiffner, 2 East, 529; McComble v. Davies, 7 East, 7; Jarvis v. Rogers, 15 Mass. 380, 408; Urquhart v. McIver, 4 Johns. (N. Y.) 103; Nash v. Mosher, 19 Wend. (N. Y.) 431.

⁵² Peisch v. Dickson, 1 Mason (U. S.) 9, Fed. Cas. No. 10,911; Sawyer v. Lorillard, 48 Ala. 332; The Rainbow, 5 Asp. M. C. 479.

⁵³ Cowell v. Simpson, 16 Ves. 275.

to abandon it.⁵⁴ The lien is also lost by entering into a relation or acting in a capacity which is inconsistent with its continuance.⁵⁵

The lien does not terminate upon the death of the principal,⁵⁶ nor does it cease because the debt or obligation is barred by the statute of limitations.⁵⁷

The lien is lost by a wrongful refusal to deliver, as where the agent refuses to deliver under claim of right not based upon his lien.⁵⁸

How Enforced.

The lien ordinarily amounts to no more than a right of retainer. The agent may assert the right as a defense if his possession is attacked, and may reclaim the thing if he is unlawfully dispossessed, but he cannot sell or dispose of the thing to satisfy his claim.⁵⁹ An exception exists in favor of a factor who has made advances upon goods consigned to him, a right to sell if upon notice his principal does not repay him being conferred.⁶⁰ In some cases a court of equity will decree a sale.⁶¹

⁵⁴ *Angus v. Machlachan*, 23 Ch. D. 330; *Re Taylor* [1891] 1 Ch. 590. See *Jones, Liens*, § 1011.

⁵⁵ *Re Nicholson, Ex parte Quinn*, 53 L. J. Ch. 302 (solicitor acting for mortgagor and mortgagee loses lien on title deeds).

⁵⁶ *Hammond v. Barclay*, 2 East, 227; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

⁵⁷ *Spears v. Hartley*, 3 Esp. 81; *Re Broomhead*, 16 L. J. Q. B. 355.

⁵⁸ *Jones, Liens*, § 1018 et seq.

⁵⁹ *Story, Ag.* § 371. But see *Dewing v. Hutton*, 40 W. Va. 521, 21 S. E. 780.

⁶⁰ *Ante*, p. 403. *Walker Co. v. Produce Co.*, 118 Iowa, 428, 85 N. W. 614, 53 L. R. A. 775.

⁶¹ *Story, Ag.* § 371; *Whitman v. Horton*, 46 N. Y. Super. Ct. 531; *Id.*, 94 N. Y. 644 (factor).

LIEN OF SUBAGENT.

- 125.** Where a subagent is appointed by authority of the principal, if he has notice that his immediate employer is not acting on his own behalf, he has, as against the principal, a particular lien, but his general lien is limited to the amount due from the principal to the agent; if he has not such notice, he has, as against the principal, the same right of lien that he would have against the agent were the agent acting on his own behalf.

Where a subagent is employed without the express or implied authority of the principal, the subagent must look to his immediate employer for remuneration, reimbursement, and indemnity,¹ and has no lien, general or particular, against the principal. Thus, if a factor, without the assent of his principal, delegates his authority to another, the latter has no lien, even for duties paid upon the goods.² If, however, the employment of the subagent is authorized, he will be entitled to a lien, the nature and extent of which depends upon whether at the time of his appointment he knows or has reason to know that the agent employing him is not acting on his own behalf.³ If the subagent has notice that his immediate employer is not so acting, he has, nevertheless, as against the principal, a particular lien;⁴ but he has, strictly speaking, no general lien.⁵ He may, however, if the agent has a lien, general or particular, avail himself of that lien by way of substitution. In other words, his general lien, as against the principal, is limited to the amount due from

§ 125. ¹ Ante, p. 462.

² *Solly v. Rathbone*, 2 M. & S. 298.

³ See *Bowstead*, Dig. Ag. art. 173; *Story*, Ag. §§ 389, 390.

⁴ *Fisher v. Smith*, 4 App. Cas. 1; *Lawrence v. Fletcher*, 12 Ch. D. 858; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

⁵ *Maanss v. Henderson*, 1 East, 335; *Snook v. Davidson*, 2 Camp. 218; *Lanyon v. Blanchard*, 2 Camp. 597; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327.

the principal to the agent.⁶ Thus, if an agent employs an insurance broker to effect a policy, although the broker is aware that the agent is acting for a principal, he has a particular lien for premiums paid by him or for which he is liable, and this notwithstanding that the principal settles with the agent;⁷ but, in the absence of a lien in favor of the agent to which he may be substituted, he has no lien as against the principal for a general balance due from the agent in other transactions.⁸ On the other hand, if the subagent has not notice that his immediate employer is not acting on his own behalf, he has the same right of lien, general or particular, as against the principal, that he would have had against the agent had the agent been acting on his own behalf.⁹ Thus, in the illustration above given, if the insurance broker were not aware that he was dealing with an agent, he would have, upon the policy, not only a particular lien, but a lien for any general balance due him as broker from the agent. Having reason to believe that his employer was the principal, he is entitled to hold the policy.¹⁰

RIGHT OF STOPPAGE IN TRANSITU.

126. Where an agent has bought goods for his principal with his own money or credit, he has, as against his principal, the same right of stoppage in transitu that he would have if he were an unpaid seller.

On account of its intrinsic justice, the courts are inclined to look with favor upon the right of stoppage in transitu, and to extend it to any one whose position is substantially that of an unpaid seller. Hence the right may be exercised by a consignor, factor, or other agent who has bought goods for

⁶ *Man v. Shiffner*, 2 East, 523; *Ex parte Edwards*, Re Johnson, 8 Q. B. D. 262.

⁷ *Fisher v. Smith*, 4 App. Cas. 1. ⁸ Cases cited note 5.

⁹ *Mann v. Forrester*, 4 Camp. 60; *Westwood v. Bell*, 4 Camp. 349; *Montagu v. Forwood* [1893] 2 Q. B. 260.

¹⁰ *Westwood v. Bell*, 4 Camp. 349.

his principal with his own money or credit, if the other conditions exist which would entitle an unpaid seller to exercise the right.¹ Where the agent is thus in the position of unpaid seller, he has ordinarily, indeed, before delivering the goods to the carrier for transmission to the principal, more than a mere agent's lien, or even seller's lien, retaining not merely possession of the goods, but the property in them.² In such case it would seem that, although shipment of the goods (if without reservation of the right of disposal) would be an appropriation to the contract, he would, upon regaining possession by exercise of the right of stoppage, be entitled to hold them subject to a seller's lien³ with a right of resale. On the other hand, if upon shipment he reserved the right of disposal, by taking a bill of lading to his own order or otherwise, so that the appropriation was only conditional, he would, upon recovering the actual possession of the goods upon nonfulfillment of the condition to which the appropriation was subject, be restored to his rights of ownership.⁴ It may be observed that a principal consigning goods to his factor has the right of stoppage in transitu, although the factor may have made advances or has a joint interest with the consignor.⁵

§ 126. ¹ *Felse v. Wray*, 3 East, 93; *Tucker v. Humphrey*, 4 Bing. 516; *The Tigrass*, B. & L. 38, 9 Jur. (N. S.) 361; *Imperial Bank v. London & St. Katherine's Docks*, 5 Ch. D. 196; *Hawks v. Dunn*, 1 Tyr. 413, 1 C. & J. 519; *Falk v. Fletcher*, 18 C. B. (N. S.) 403; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Seymour v. Newton*, 105 Mass. 272, 275; *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259; *Gossler v. Schepeler*, 5 Daly (N. Y.) 476. See, also, *Hollins v. Hubbard*, 165 N. Y. 534, 59 N. E. 317.

Otherwise where an agent having a lien for advances ships at his principal's request to a buyer. *Gwyn v. Railroad Co.*, 85 N. C. 429, 39 Am. Rep. 708. See *Tiffany, Sales*, 215.

² *Shepherd v. Harrison*, L. R. 4 Q. B. 190, 493, 5 H. L. 116; *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818.

³ *Tiffany, Sales*, 226.

⁴ *Tiffany, Sales*, 104.

⁵ *Kinloch v. Craig*, 3 T. R. 119; *Newsom v. Thornton*, 6 East, 17.

APPENDIX.

NEW YORK FACTORS' ACT.

LAWS 1830, c. 179.

An Act for the Amendment of the Law relative to Principals and Factors or Agents. [Passed April 16, 1830.]

§ 1. After this act shall take effect, every person in whose name any merchandize shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandize to a lien thereon.

1. For any money advanced, or negotiable security given, by such consignee, to or for the use of the person in whose name such shipment shall have been made; and,

2. For any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee.

§ 2. The lien provided for in the preceding section, shall not exist where such consignee shall have notice, by the bill of lading or otherwise, at or before the advancing of any money or security by him, or at or before the receiving of such money or security by the person in whose name the shipment shall have been made, that such person is not the actual and bona fide owner thereof.

§ 3. Every factor or other agent, entrusted with the possession of any bill of lading, custom-house permit, or warehouse keeper's receipt for the delivery of any such merchandize, and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of any merchandize for the purpose of sale, or

as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandize, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

§ 4. Every person who shall hereafter accept or take any such merchandize in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandize or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

§ 5. Nothing contained in the two last preceding sections of this act, shall be construed to prevent the true owner of any merchandize so deposited, from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandize, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandize shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

§ 6. Nothing contained in this act shall authorize a common carrier, warehouse-keeper, or other person to whom merchandize or other property may be committed for transportation or storage only, to sell or hypothecate the same.

[§ 7. Repealed by Laws 1886, c. 593.]

§ 8. Nothing contained in the last preceding section, shall be construed to prevent the court of chancery from compelling discovery, or granting relief upon any bill to be filed in that court by the owner of any merchandize so entrusted or consigned, against the factor or agent by whom such merchandize shall have been applied or sold contrary to the

provisions of the said section, or against any person who shall have been knowingly a party to such fraudulent application or sale thereof; but no answer to any such bill shall be read in evidence against the defendant making the same, on the trial of any indictment for the fraud charged in the bill.

ENGLISH FACTORS' ACT, 1889.

52 & 53 VIOT. c. 45.

An Act to Amend and Consolidate the Factors' Acts. [26th August, 1889.]

Be it enacted * * * as follows:

Preliminary.

I. For the purposes of this act—

(1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

(3) The expression "goods" shall include wares and merchandise:

(4) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery,

the possessor of the document to transfer or receive goods thereby represented:

(5) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

(6) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

2.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this act, be deemed to be with the consent of the owner.

(4) For the purposes of this act the consent of the own-

er shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. For the purposes of this act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7.—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

Supplemental.

11. For the purposes of this act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

12.—(1) Nothing in this act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2) Nothing in this act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

13. The provisions of this act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this act.

14. The enactments mentioned in the schedule to this act are hereby repealed as from the commencement of this act, but this repeal shall not affect any right acquired or liability

incurred before the commencement of this act under any enactment hereby repealed. [The enactments mentioned in the schedule are 4 Geo. IV, c. 83; 6 Geo. IV, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39.]

15. This act shall commence and come into operation on the first day of January, one thousand eight hundred and ninety.

16. This act shall not extend to Scotland.

17. This act may be cited as the Factors Act, 1889.

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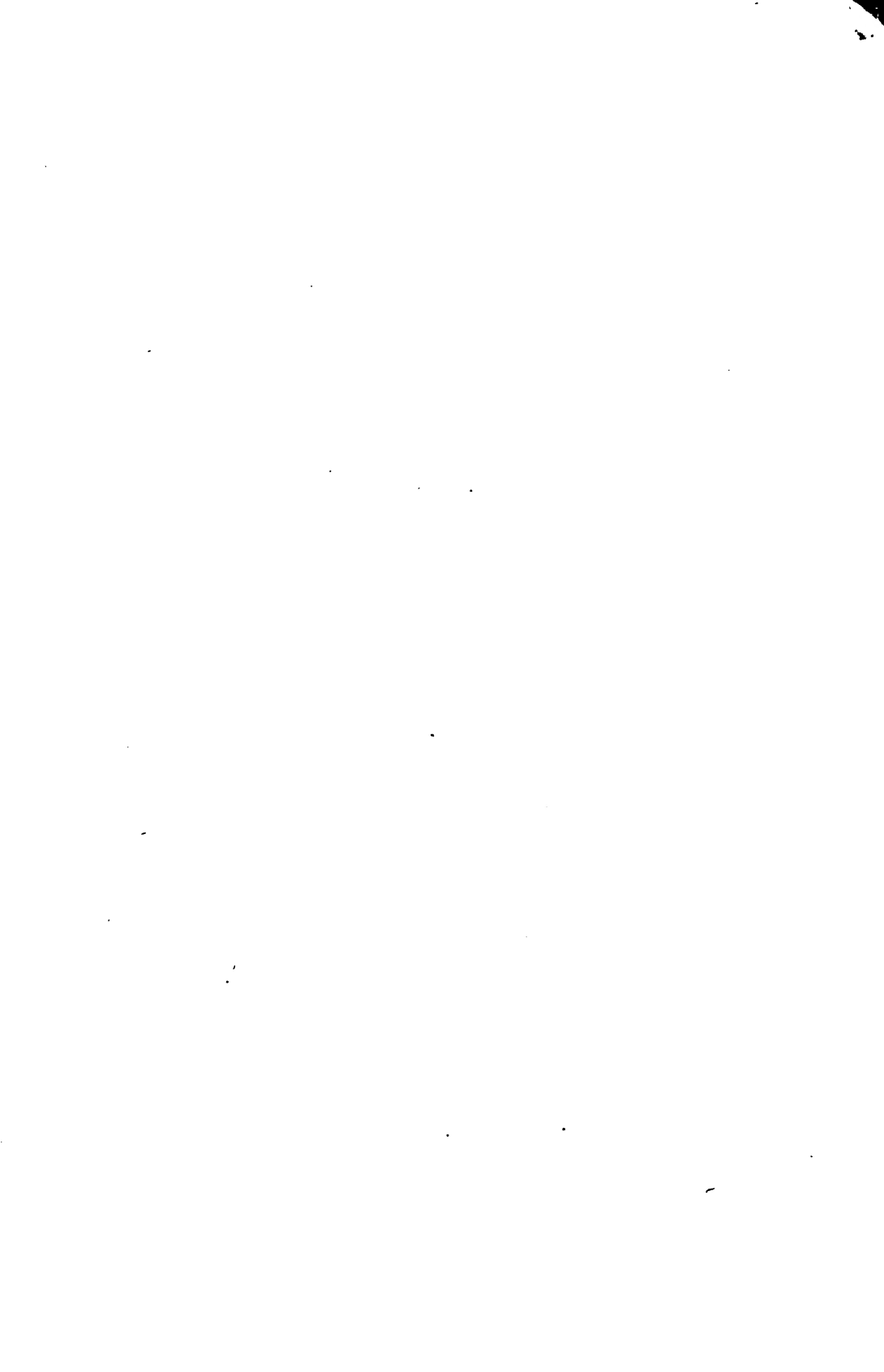
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